IN THE UNITED STATES
SUPREME COURT

OCTOBER TERM 1979

No. 78-6276

- -X

VINCENT VIDAL, :

Petitioner, :

v. :

PEOPLE OF THE STATE OF NEW YORK, :

Respondent. :

- -X

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

and

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT AND NEW YORK COURT OF APPEALS

BERNARD G. EHRLICH

CHARLES SUTTON
Attorney for Petitioner
299 Broadway
New York, New York 10007
212-964-8612

SUPREME COURT OF THE UNITED STATES

- -X

VINCENT VIDAL, :

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PEOPLE OF THE STATE OF NEW YORK, :

Respondent. :

- -X

Motion for Leave to
Proceed In Forma Pauperis

Please Take Notice that upon the affidavit of Vincent Vidal, sworn to February 25, 1979 and the affidavit of Charles Sutton, sworn to February 25, 1979, the undersigned will move this Court for leave to proceed in forma pauperis pursuant to Supreme Court Rules, Rule 53 and 28 U.S.C. Section 1915 authorizing Charles Sutton, Esq. to represent the petitioner without charge or claim against the United States for legal fees, and granting petitioner such other and further relief as may be just and proper.

Dated: New York, New York
February 25, 1979

Charles Sutton
Attorney for Petitioner
299 Broadway
New York, New York 10007
212-964-8612

To: Clerk, Supreme Court
of the United States

To: New York State
Attorney General

SUPREME COURT OF THE UNITED STATES

- -X

VINCENT VIDAL, :

Petitioner, :

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- -X

State of New York)
) SS.:
County of Westchester)

Vincent Vidal, being duly sworn, deposes and says:

1. I am the petitioner and I make this affidavit in support of my motion for leave to proceed in forma pauperis on my petition for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department and to the New York Court of Appeals.

2. I was indicted by two indictments from the Supreme Court of the State of New York, County of Kings, indictments number 7824/73 and 7826/73 with alleged sale of cocaine and possession of cocaine, upon which judgments of conviction after trial by jury were rendered on January 22, 1975, sentencing me to a mandatory jail term of fifteen years to life. I have been confined to jail since November 1, 1974.

prior to my confinement to jail, I was employed as a longshoreman for over fifteen (15) years. I had never before been arrested or convicted of any crime.

3. I own no assets of any kind. I have no bank accounts, no stock holdings, no real estate and no property of any kind, and no income, except what small amounts of money I might be able to earn while working in jail. I am presently confined at the Greenhaven Correctional Institution of the New York State Department of Correction at Stormville, New York.

4. I was unable to pay either for legal fees or costs of transcripts or other expenses on my appeal to the New York State Supreme Court, Appellate Division, Second Department. As a result thereof, upon the application to that court, I was allowed to appeal in forma pauperis by order of that court dated and filed June 23, 1975, a copy of which is attached hereto.

5. I am unable to pay the costs to proceed in the prosecution of my petition for a writ of certiorari to the New York State Supreme Court, Appellate Division and New York Court of Appeals.

6. My attorney Charles Sutton, Esq. has agreed to represent me in this Court without a present payment of a

legal fee upon the understanding that I would pay him when I am able, which I agree to do, and without any expense to the United States. He has represented me on the trial of these indictments, upon my appeal to the Supreme Court of the State of New York, Appellate Division, Second Department, upon my application for leave to reargue the appeal to that court, and upon my application to Hon. Jacob D. Fuchsberg, Associate Judge of the New York Court of Appeals for leave to appeal to that court from the order of the said Appellate Division affirming the judgment of conviction.

7. No previous application has been made to this Court for this relief.

8. As shown by my attached Petition for a Writ of Certiorari, my appeal is meritorious and presents important constitutional questions which the State court has decided in conflict with applicable decisions of this Court, (Petition, Points I, II) and in addition, presents an important question of federal law which has not been determined by this Court (Petition, Points III-IX).

Vincent Vidal
Vincent Vidal

Sworn to before me this
25th day of February, 1979

Notary Public, State of New York
FRANCIS B. McDONNELL
Notary Public, State of New York
Qualified in Dutchess County
Commission expires March 30, 19[illegible]

SUPREME COURT OF THE UNITED STATES

- -X

VINCENT VIDAL, :

Petitioner, :

v. :

PEOPLE OF THE STATE OF NEW YORK, :

Respondent. :

- -X

State of New York)
) SS.:
County of New York)

Charles Sutton, being duly sworn, deposes and says:

1. I am the attorney for the petitioner and I am familiar with the facts herein.

2. I agree to represent the petitioner in proceedings in this Court and to prosecute the proceedings of the petitioner in this Court without present payment of any legal fee by the petitioner and I agree to be paid by the petitioner when he is able to pay me. I agree not to apply to or seek payment from the United States on account of any legal fee in any proceedings in this Court on behalf of this petitioner.

3. I am familiar with the Rules of this Court. I have not yet applied for admission to become a member of the Bar of this Court, although I am able and qualified to do so, and shall do so as promptly as feasible.

4. The petitioner has been confined to jail since on or about November 1, 1974.

Charles Sutton

Sworn to before me this
25th day of February, 1979

Notary Public, State of New York

No. 41-0133[illegible]

Notary Public
No. 41-0133[illegible]

IN THE UNITED STATES
SUPREME COURT

OCTOBER TERM 1979

No._____

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT AND NEW YORK COURT OF APPEALS

BERNARD G. EHRLICH

CHARLES SUTTON
Attorney for Petitioner
299 Broadway
New York, New York 10007
212-964-8612

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IN THE UNITED STATES
SUPREME COURT

OCTOBER TERM, 1979

NO._____

- -X

VINCENT VIDAL, :

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT AND THE NEW YORK COURT OF APPEALS

TO: The Honorable Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Vincent Vidal, by Charles Sutton, his attorney, respectfully petitions for a writ of certiorari to the New York State Supreme Court, Appellate Division, Second Department and the New York Court of Appeals upon the grounds set forth below.

Statement Pursuant to
U.S. Supreme Court
Rule 23, 28 U.S.C.A.

1(a) The decision, opinion and order of the New York Supreme Court Appellate Division, Second Department, dated February 21, 1978, was reported at 61 A.D. 2d 825. A copy of the order and opinion of that court dated and entered February 21, 1978 is appended at pages 1a and 2a. A copy of the order dated and entered June 26, 1978 of that court, which denied the petitioner's motion to restore the appeal to the appeal calendar for argument on the ground that the court did not afford the petitioner his fundamental right to appeal to that Court since that Court did not have before it 1,500 pages, or almost one-half of the trial transcript, which were omitted from the record on appeal delivered to the Appellate Division by the Supreme Court, Kings County Appeals Bureau, and upon which incomplete record that Court rendered its review on appeal and its decision on appeal was not Reported, and a copy thereof is appended at page 3a. The decision, opinion, and order of Honorable Jacob D. Fuchsberg, Associate Judge of the New York Court of Appeals, dated and entered November 27, 1978 which denied the petitioner leave to appeal to that court from the said Appellate Division orders is not yet reported unofficially at _____ N.Y.S. 2d _____ and officially at _____ N.Y. 2d _____, and is appended at page 4a.

1(b) (i) The orders sought to be reviewed are the orders of the said Appellate Division entered February 21, 1978 and June 26, 1978.

(ii) The order respecting a rehearing (which was not opposed by the District Attorney) was the said order dated and entered June 26, 1978. The time within which to file this petition is calculated from the date of entry of November 27, 1978 of the said order of New York Court of Appeals Associate Judge Jacob D. Fuchsberg.

(iii) The statutory authority believed to confer on this court jurisdiction to review the orders in question by writ of certiorari is 28 U.S.C. Section 1257(3), to wit:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> .....
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under

the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

1(c) The questions presented for review are as follows:

(1) Given New York's statutory guarantee to every criminal defendant in all criminal prosecutions of "an absolute and fundamental right to appeal a conviction", and given New York's requirements that a full and complete transcript of the trial be filed with it as constituting the record on appeal on an appeal in forma pauperis, and given New York's requirement that the Appellate Division has the power to review both the facts and the law and to render its review and decision on both grounds, is the petitioner denied his Constitutional rights to due process of law and equal protection of the law upon his appeal to that court in forma pauperis when that Appellate Division renders its decision on the petitioner's criminal appeal without having before it and without reviewing almost 1,500 pages out of a trial transcript of 3,000 pages, being one-half of the trial transcript, on a trial which commenced November 4, 1974 and ended December 4, 1974 and in which the missing trial transcript pages included the testimony by a majority of the witnesses produced at trial and included the majority of the admissions of the evidence presented at trial which was vigorously contested and in which

at least thirty appellate points of error were presented in petitioner's brief to that court?

(a) Was the petitioner's Constitutional right to appeal violated by the refusal of the trial court to make a record of the tape recording between the undercover police officer and alleged accomplice Rosario Barbarino which were played to the jury and as to which no minutes or reconstruction thereof was made for inclusion in the trial record or in the record on appeal?

(2) Were the petitioner's Constitutional rights under the Fourteenth, Fourth and Fifth Amendments violated by the police when they broke into the petitioner's private apartment without a warrant, without announcing their purpose, without exigent circumstances allegedly to arrest a person named Rosario Barbarino who did not reside at petitioner's apartment, whose residence address the police knew to be elsewhere than the petitioner's apartment, without probable cause to believe that the said Rosario Barbarino was then inside the petitioner's apartment, in the face of police evidence that the police at that time knew that Rosario Barbarino was not inside the petitioner's apartment, and the police testimony that after they entered they did not find Rosario Barbarino to be in the petitioner's apartment, which forcible entry into petitioner's apartment occurred following the use by police of their drawn guns and police badges to force a tenant

of the building who was in the outer lobby to use his key to open the locked inner lobby door for the police and from there, the police proceeded up the stairs to petitioner's apartment, where the police after such entry seized and handcuffed petitioner at the vestibule of the apartment, and thereupon entered the petitioner's apartment and searched the same, and allegedly seized items upon which the petitioner was indicted and convicted of possession of narcotic drugs and paraphernalia, which evidence was also used to prejudice petitioner in his trial?

(3) Were the petitioner's Constitutional rights to due process of law and to a fair trial violated by the knowing elicitation and use by the prosecution from Rosario Barbarino, the alleged accomplice of petitioner, that in return for his testimony the District Attorney had promised him a jail sentence of eight years to life, when in fact the promise was for life probation, which the District Attorney recommended shortly after the end of this trial, and Rosario Barbarino was sentenced to lifetime probation?

(4) Was the petitioner's Constitutional rights under the Fifth Amendment violated by the statement by the prosecutor, over objection that "If for a minute there was any doubt whether this stuff is cocaine --- He could have produced his own chemist"?

(5) Was the petitioner's Constitutional right to due process of law and a fair trial violated by the trial court's prejudicial conduct including siding with and counselling the prosecution?

(6) Was the petitioner's Constitutional rights under the Fifth and Sixth Amendments violated when the trial court charged the petitioner with the crime(s) of conspiracy and acting in concert which were not charged or alleged in the indictment(s) and allowed the prosecution to introduce inadmissible hearsay thereunder?

1(d) The Constitutional provisions, statutes and Rules of Court are set forth at length and appended at pp. 5a-9a, to wit: U.S. Constitution: Fourth, Fifth and Sixth Amendments (pp. 5a); New York Criminal Procedure Law Sections 450.10; 460.70(1); 470.05; 470.15; 470.20; 470.50(1) (pp. 5a-9a).

Statement of the Case and Facts

The defendant Vincent Vidal was charged by two separate indictments, 7824/73 and 7826/73, Kings County Supreme Court, which were consolidated for trial over objections.

Indictment Number 7824/73 contained six counts. The first count charged defendant with the sale of a controlled substance in the first degree (alleged cocaine) on November 20,

1973, by the Fourth Count with sale of a controlled substance in the third degree (alleged cocaine) on November 8, 1973. The Second and Third Counts charged defendant, respectively, with possession with intent to sell, and possession of the alleged cocaine charged in the First Count. The Fifth and Sixth Counts charged defendant with possession with intent to sell and possession of the alleged cocaine charged in the Fourth Count.

Indictment Number 7826/73 charged defendant by the First Count with sale of cocaine in the First Degree committed on December 27, 1973. The Second and Third Counts charged possession with intent to sell and possession, based on the sale count. Counts 4, 5, 6, 7, 8, 9, 10 and 13, charged possession of almost every controlled substance allegedly seized in defendant's apartment, to wit, 4 - cocaine (by aggregating small amounts of white powder found in the apartment); 5 - opium; 6 - amphetamine; 7 - methaqualone; 8 - barbiturates; 9 - marijuana (also by aggregation); 10 - "materials suitable for packaging ... narcotics ... or stimulants"; 13 - possession (.22 cal.) revolver; 14 - possession (.38 cal.) revolver; 15 - possession stolen (.38 cal.) revolver. Count 15 was dismissed on motion.

The defendant was convicted after trial by jury on all counts except the one dismissed count, as above. The defendant was sentenced on January 22, 1975 on each of two sale

counts and two possession counts to a term of 15 years to life in jail, to run concurrently. The schedule of his sentences on the consolidated indictments is set forth as follows (all sentences were to run concurrently):

Consolidated Indictment Counts	7824/73 Indictment Counts	Charge	Sentence
1	4	Sale cocaine, third degree, November 8, 1973.	1 yr. to life.
2	5	Possessing cocaine with intent to sell.	1 yr. to life.
3	6	Possession cocaine.	Dismissed.
4	1	Sale cocaine first degree, November 20, 1973.	15 yrs. to life.
5	2	Possession cocaine with intent to sell.	Dismissed.
6	3	Possession cocaine.	Dismissed.
	7826/73 Indictment Counts		
7	1	Sale cocaine, first degree, December 27, 1973.	15 yrs. to life.
8	2	Possession cocaine, with intent to sell, December 27, 1973.	Dismissed.
9	3	Possession cocaine, December 27, 1973.	15 yrs. to life.
10	4	Possession cocaine, December 27, 1973.	15 yrs. to life.
11	5	Possession opium, December 27, 1973.	1 year.

Consolidated Indictment Counts	7826/73 Indictment Counts	Charge	Sentence
12	6	Possession, amphetamine, December 27, 1973.	1 year.
13	7	Possession, Methaqualone, December 27, 1973.	1 year.
14	8	Possession barbiturates, December 27, 1973.	1 year.
15	9	Possession marijuana, December 27, 1973.	Max. 3 years.
16	10	Possession materials, December 27, 1973.	1 year.
17	13	Possession (.22 cal.) Revolver, December 27, 1973.	1 year.
18	14	Possession (.38 cal.) revolver.	1 year.
19	15	Possession (.38 cal.) stolen revolver, December 27, 1973.	Dismissed.

The defendant has been confined to jail since November 4, 1974 upon the commencement of the jury trial. The jury verdict was rendered on December 4, 1974.

The defendant timely filed his notice of appeal from the judgment of conviction to the Supreme Court of the State of New York, Appellate Division, First Department.

Thereafter the defendant applied by motion to the Appellate Division for leave to appeal in forma pauperis. That

motion was granted by order entered June 23, 1975, a copy of which is appended at page a-____, which directed that "Pursuant to statute (CPL 460.70) within the twenty day period prescribed therein, the stenographer of the trial court is required to make, certify and file two typewritten transcripts of the stenographic minutes of the proceedings of the hearing, trial, and sentence and the clerk of the trial court shall furnish one such certified transcript to appellant, without charge." On November 2, 1977 the defendant's brief was filed with the Appellate Division without a notice of argument and without a note of issue. Thereafter a calendar was published in the New York Law Journal showing that the case was scheduled for argument for February 6, 1978. The defendant's counsel was actually on trial in a criminal case from January 3, 1978 to March 8, 1978. As a result the appeal was marked submitted without oral argument. The Appellate Division rendered its decision and order entered on February 21, 1978 affirming the judgment of conviction.

Following that order by the Appellate Division entered February 21, 1978, defendant's counsel discovered that the Appellate Division had not had a complete transcript of the trial upon which its appellate review was rendered. Pursuant to New York Criminal Procedure Law Section 460.70, and the aforesaid order of the Appellate Division entered June 23, 1975, the Kings County Supreme Court Appeals Bureau was required

to furnish the Appellate Division with a complete trial transcript which would be part of the record on appeal. The total number of pages of the trial transcript was approximately 3,000 pages. People v. Curro, 25 N.Y. 2d 44 (1969). The trial transcript for pages "1,200 (1,500) to 3,213/1" however was not presented or delivered to the Appellate Division. The trial transcript beginning from page 1 to the end was apparently presented in one volume and gave the appearance of completeness. However, the pages "1,200 (1,500) to 3,213/1" in fact were omitted. An investigation by the Appeals Bureau clerk confirmed the fact that almost one-half of the trial transcript had not been before the Appellate Division on the appeal. Within the time allowed by statute, a motion for reargument dated March 23, 1978 was duly filed which presented these facts to the Appellate Division, asserting that the defendant "be accorded his statutory and constitutional right to have a review on appeal from the judgment herein upon a complete record" as set forth in the affirmation of Charles Sutton dated April 27, 1978. The District Attorney did not oppose the motion. Notwithstanding that the District Attorney did not oppose the motion the Appellate Division denied the motion by its order entered June 26, 1978 appended at page a_____.

The trial transcript which was filed by the said Appeals Bureau with the Appellate Division was deficient to

the extent of almost 1,500 pages out of a total of 3,000 pages. The trial period missing transcript was from November 18, 1974 to November 29, 1974. The trial commenced November 4, 1974 and continued until December 4, 1974 when the jury rendered its verdict. Those pages which were missing from the Appellate Division record on appeal included the testimony of undercover police officer Florio, police Sergeant Toal, police officer Kennedy and all three of the police chemists, Acevedo, Agatow and Ferrar, whose testimony concerned each of the three counts of sale of alleged cocaine. The competence and the test procedures allegedly employed by each police chemist to "identify" "white powder" as "cocaine" waschallenged and impeached. The trial transcript of their testimony showed that the evidence was insufficient as to each sale count to authorize a guilty verdict. Numerous objections to the introduction of evidence was included in the missing pages. There was no way an appellate court could review the trial without those 1,500 missing pages. As shown by the copy of the Index to petitioner's brief to the Appellate Division, appended at pp. a_____, the issues presented were substantial and critical issues of fact and of law which could not be resolved without a review of the trial transcript.

POINT I

The indigent petitioner was denied his fundamental right to have his conviction reviewed on appeal by the Appellate Division.

New York Criminal Procedure Law Section 450.10 grants every defendant "following a judgment sentence and order of a criminal court" a right to appeal.

> "In New York State, every defendant has an absolute and 'fundamental right' to appeal a conviction (People v. Montgomery, 24 N.Y. 2d 130, 132, 299 N.Y.S. 2d 156, 159, 247 N.E. 2d 130, 132, supra; see, also, CPL 450.10). The denial of that right constitutes as much a failure of due process as would the denial of the right to a trial itself, and, where its denial or serious obstruction comes about because of poverty, it constitutes a denial of equal protection as well (Griffin v. Illinois, 351 U.S. 12, 18, 76 S. Ct. 585, 100 L.Ed. 891; People v. Montgomery, supra, p. 134, 299 N.Y.S. 2d, p. 161, 247 N.E. 2d p. 133)."

People v. Rivera, 39 N.Y. 2d 519, 522 (1976); People v. Melton, 35 N.Y. 2d 327, 329 (1974). In order to give substance to that "absolute and fundamental right to appeal a conviction",

People v. Rivera, supra, a stenographic transcript of the trial, absent circumstances not applicable here, is essential in order ' for a reviewing court to provide the review of a conviction that a defendant is entitled to receive.' People v. Rivera, supra. "The right to appeal requires a review of the merits upon an appeal" and that requires the reviewing court to review the trial transcript on the merits. People v. Borum, 8 N.Y. 2d 177 (1960). "There can be no doubt that a criminal appellant is entitled to a 'record of sufficient completeness' (CPL 460.70, subd. 3; Code Crim. Proc. Section 485; Mayer v. City of Chicago, 404 U.S. 189, 193-195, 92 S. Ct. 410, 30 L. Ed. 2d 372; People v. Pride, 3 N.Y. 2d 545, 549, 170 N.Y.S. 2d 321, 323, 147 N.E. 2d 719, 720." People v. Hall, 32 N.Y. 2d 546, 551 (1973); Draper v. Washington, 372 U.S. 487, 497, 499 (1963). Without a complete transcript of the trial testimony, there can be no valid review by the appellate court. People v. Pride, 3 N.Y. 2d 545, 549-550 (1958); People v. Giles, 152 N.Y. 136, 139 (1897); People v. Hartley, 34 A.D. 2d 733 (4th Dept. 1970); People v. Schwack, 16 A.D. 2d 879 (4th Dept. 1962); People v. Hines, 57 App. Div. 419 (1st Dept. 1901); People v. Williams, 13 A.D. 2d 814 (2d Dept. 1961); People v. De Mayo, 2 A.D. 2d 985 (2d Dept. 1956); People v. Eldridge, 34 A.D. 2d 693 (3rd Dept. 1970); People v. Cittrola, 210 N.Y.S. 21 (App. Div. 1st Dept. 1925); People v. Adams, 22 A.D. 2d 892 (2d Dept. 1964).

In view of the fact that the indigent petitioner's forma pauperis appeal to the Appellate Division required a complete trial transcript for appellate review, an appellate review based only on approximately one-half of the trial transcript denied the petitioner his Constitutional rights to due process of law and equal protection of the law to have a full review of his appeal on the merits as available to all defendants. Mayer v. City of Chicago, 404 U.S. 189, 193-195 (1971); Draper v. Washington, 372 U.S. 487, 488-489, 493-500 (1963).

POINT II

The defendant was denied his Constitutional rights to due process of law and to a fair trial by the knowing use by the prosecution of false and perjured testimony.

The prosecution elicited false and perjured testimony by Rosario Barbarino that the promise made to him for his testimony by the District Attorney was a jail sentence of a minimum of eight (8) years to life (1743, 1942-43)(12-2-74; 195-199) when, in fact, the promise made was for lifetime probation

The false testimony denied the defendant his Constitutional rights to due process of law and to a fair trial and require that the judgment of conviction must be reversed. Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972); People v. Savvides, 1 N.Y. 2d 554, 557 (1957); People v. Mangi, 10 N.Y. 2d 86 (1961); People v. Zimmerman, 10 N.Y. 2d 430 (1962); People v. York, _____ A.D. 2d _____, 396 N.Y.S. 2d 956 (4th Dept. 1977).

Each alleged sale and possession counts against the defendant for the dates November 18, 1973, November 20, 1973 and December 27, 1973 depended essentially upon the testimony of Rosario Barbarino. His credibility was an important issue in this case.

On the direct, the prosecution asked Barbarino to state the promises which were made to him if he cooperated and testified in this matter (1743). Barbarino testified that he had been promised a jail sentence of "eight years to life" (1743).

"Q. And in return for your testimony in this case have any promises been made to you?

A. Yes.

Q. What promise was made to you?

A. I was promised that if I cooperate and testify in this matter my sentence would be eight to life.

Q. Eight years to life?

A. Yes.

Q. Do you know what minimum sentence you face without such a recommendation?

A. Minimum of fifteen to life." (1743)

On cross-examination, the defense questioned Rosario Barbarino as to this promise made to him by the prosecution (1942-1943):

"Q. Mr. Barbarino, are you aware, Mr. Barbarino, that the sale of any quantity of some controlled drugs can result in a life sentence?

Mr. Farkas: Objection, Your Honor. It is irrelevant.

The Court: Overruled.

A. Yes.

Q. Are you charged by indictment with crimes alleging sales of controlled substances under which you can get a life sentence?

A. Yes.

Q. As a matter of fact, you are charged with a number of them, are you not?

A. Yes.

Q. And does it weigh on your mind that you could be sentenced to any life sentence at all?

A. Yes.

Q. And it bothers you greatly?

A. Yes.

Q. You are afraid of going to jail for a lifetime, are you not?

Mr. Farkas: Objection, Your Honor. It is an improper question 'going to jail for a lifetime'.

The Court: Sustained in that form.

Q. Are you afraid to be sentenced to life imprisonment?

Mr. Farkas: Objection, Your Honor. He is already sentenced. He is getting sentenced to life imprisonment.

The Court: I'll permit it. Overruled.

A. Yes, I'm scared.

Q. And you made a deal by reason of that fear with Mr. Farkas, did you not?

A. Yes.

Q. Do you know the full extent of the deal that your attorney made with Mr. Farkas?

A. No.

Q. But as far as you are concerned, you are getting alleviated from the penalties that you would have had by reason of the indictment facing you, isn't that true?

A. Yes." (1942-43) (Underscoring added).

The prosecutor, on summation, falsely declared to the jury (12-2-74: 195-6; 198-199) that Rosario Barbarino

"is going to pay for it dearly. He is up against the wall and everybody knows that. I am not an ostrich. I am not going to hide my head and say he is wonderful. I wanted you to see who he is. (196-7)... Now com(ing) here may be the first decent thing he ever did in his life. And even that he did with a sword hanging over his head. He had a motive to lie...

You heard the promise that was made to him. He got about seven years off his Brooklyn sentence and he is going to do time, hard time. He spoke to you about a life sentence. That doesn't mean he is going to spend the rest of his life in jail. He is going to do some time and then he will be on parole..." (198-199, 12/2/74) (Underscoring added).

The facts known to the prosecution at the time of the trial and at the time of the testimony of Rosario Barbarino were that the actual promises made to Rosario Barbarino by the prosecution, by the authorized Assistant District Attorneys, were that

Rosario Barbarino would not be sentenced to any jail term whatever, and that he would be sentenced to lifetime probation

These facts were known to the prosecution since January, 1974, ten (10) months prior to the commencement of this trial, and almost eleven (11) months prior to the time when Rosario Barbarino testified on November 19, 1974 in this trial (1741), as shown by the deposition of Henry M. Gargano, Esq., taken on August 4, 1977 and sworn to August 18, 1977.

, and the affirmation of Assistant District Attorney Arnold Taub, sworn to January 27, 1975

Assistant District Attorney Arnold Taub confirmed in his affirmation dated January 27, 1975 , that Barbarino "surrendered" on December 28, 1973 and that

> "Immediately upon his surrender defendant (Barbarino) agreed to cooperate with the Police Department by giving information regarding trafficking in drugs. He has continued to do so to date and will continue subsequent to the plea..."

A.D.A. Taub also confirmed the life probation plea bargain in his said affirmation:

> "pursuant to Section 65.00(1)(b) and 65.00(3)(a)(ii) of the Penal Law, the People recommend that the above named defendant (Barbarino) be sentenced to life probation upon his plea of guilty to Criminal possession of a controlled substance in the Third degree, a Class A-III Felony..."

The false testimony seriously prejudiced the defendant in the defense of these serious charges. This witness Barbarino testified that he has lied in his life (1943) and that it did not bother him to lie (1943, 1944). He testified that he was "scared" of being sentenced to life imprisonment (1943), and that he would

do whatever he could to get himself out from under (1943). On the other hand, a prison sentence of eight (8) years to life, while it is a lesser sentence in terms of a minimum sentence, is nonetheless a substantial and heavy prison sentence. The normal reaction of a juror would be that Barbarino does not have a sufficient reason to fabricate his testimony or to tailor his testimony to suit the benefit of the prosecution and curry its favor.

The issue of the promise made by the District Attorney to Barbarino in exchange for his testimony was presented to the jury as a very important matter at the time that the jury was being selected (439, 464, 465, 580-584). The prosecutor went to great lengths to condition the jurors into accepting Barbarino's testimony at face value notwithstanding the fact that he was testifying as a result of promises made by the District Attorney's office because "he's got a lot to lose" (439). He argued to the jury that Barbarino was testifying not to aid himself, but simply to tell the "facts". (439-442, 464-465, 610, 485-486, 492-493, 532, 534, 537, 566, 573, 580-584, 594-595, 597-598, 619-620, 625-627, 636-638). The prosecutor made it an important part of the jury selection process to personally assure the jury that Rosario Barbarino would tell them the truth as to what promise was made to Barbarino for his testimony. He conditioned the jurors to accept Barbarino's testimony as truthful because Barbarino would be truthful about the promise made to him by the District Attorney and about the plea bargain under which he would give his testimony. The prosecutor assured the jury "I'm not hiding anything from you" (439), to wit:

"Mr. Parkas: And now I'd like to ask you about the other side - the co-defendant Rosario Barbarino coming to testify and I'm not hiding anything from you and I'm telling you and every other member of the jury that he was made promises and the judge will tell you after very carefully analyzing the testimony because he's got reasons to lie if that's what he's going to do; he's got a lot to lose too. I'm not an ostrich; I'm not going to hide my head, but are you still willing to listen to him despite all of that?" (439) (Underscoring added).

The prosecutor assured the prospective jurors that Barbarino would tell them the truth as to what the promise was:

"Mr. Parkas: Now you are going to hear from Rosario Barbarino. Rosario Barbarino was made certain promises in order to have him turn State's evidence. He will tell you what that promise is. I can't tell you...(464) ...

In Return for Rosario Barbarino giving evidence on behalf of the State, he was made certain promises. What those promises were, he'll tell you and he's already been made that promise... I'm also not going into what the promise was but that fact alone, will that be enough for you to dismiss the testimony of Rosario Barbarino at this point?

Mr. Sutton: Objection.

The Court: Sustained.

Mr. Parkas: Would you be willing to listen to Rosario Barbarino and weigh his testimony together with all the other evidence in this case, Mr. Shaw?

Mr. Shaw: Yes. (465) ...

Mr. Parkas: My question to you, sir, that because of the fact that he was made certain promises, would that be enough to reject his testimony?

Mr. Zar: I'd have to hear more evidence to corroborate it." (610).

The importance of the false testimony in the minds of the jurors, and the weight which they would give to Barbarino's testimony is exemplified by one juror's statement that

"I'd like to hear the facts. I'd like to know what he was promised." (479).

This statement may fairly be stated as being the attitude of the other prospective jurors.

The prosecutor misrepresented to the trial court and defense counsel that Barbarino first became an informant "the day of the suppression hearing" (794), when in fact Barbarino had first become an informant on December 28, 1973 and in January, 1974, almost eleven (11) months before the first day of the suppression hearing as the affidavit of Henry M. Gargano, sworn to August 18, 1977 and the affirmation of Arnold Taub dated January 27, 1975 show The prosecutor indicated that same misrepresentation to the jury that his deal was made just "prior to coming here to testify" (1952):

"Q. Prior to coming here to testify, and the so-called deal was offered to you, were you told what effect the deal would have if you lied on the stand?

Mr. Sutton: Objection. May we have a sidebar, Your Honor?

The Court: Sustained. No." (1952)

The prosecutor misrepresented to the trial court and defense counsel the true status of Barbarino upon the prosecutor's motion to consolidate the two indictments numbers 7824/73 and 7826/73:

"Mr. Parkas: Judge, I asked that you decide that for the following reason, I have to know which defendant I am going to trial with. I intend to go with Vidal, Russo and Barbarino. The second indictment (36)..."

The prosecutor stated that he will consent to defendant Russo being severed,

"... in which event, we will be on trial with defendant Barbarino and defendant Vidal ... on all two indictments, three sales (80)."

The prosecutor misrepresented again to the court and defense counsel that he was putting Barbarino on trial for the charges under indictments 7824/73, 7825/73 and 7826/73 (T. 5-6,

11/4/74) and again at T. 7, 11/4/74, and again at T. 15, 11/4/74, and again at T. 68, 11/4/74, when he knew all along that Barbarino would not be tried and that Barbarino had been promised a lifetime probation, had made his plea bargain, and that Barbarino was to be a prosecution witness.

Later after the suppression hearing upon the commencement of the trial, the defense moved

> "to require the People to give me discovery with respect to the prior connection or history or relationship between the defendant Rosario Barbarino and the police.
>
> The Court: I don't know what you're talking about.
>
> Mr. Sutton: I'm talking very specifically. I respectfully suggest that Rosario Barbarino was, in one way or another, a police agent." (722-723).

The issue was clearly presented for the prosecutor to state the truth regarding the plea bargain of and promise made to Rosario Barbarino (723). However, the prosecutor chose not to disclose the true facts, but to conceal the truth, to wit (723):

> "Mr. Farkas: I'm going to state on the record (once), and for all to clear this up. Rosario Barbarino was not in any form of a police agent on November 8, November 20, or December 27, inclusive. He was arrested as a defendant. Now that Rosario Barbarino is agreeing to testify against Vincent Vidal, all of this happened subsequent to December 27. He has agreed to testify against Vincent Vidal, I would say, prior to the motion controverted last week. Prior to that, I had no conversations with Rosario Barbarino nor has any police officer, to my knowledge, had any conversations with Rosario Barbarino concerning his testimony at this trial.
>
> The Court: The application is denied" (723) (Underscoring added).

The United States Supreme Court, in Miller v. Pate, 386 U.S. 1, 7 (1967) held:

> "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. Mooney

> v. Holohan, 294 U.S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A.L.R. 406. There has been no deviation from that established principle. Napue v. Illinois, 360 U.S. 264, 3 L.Ed. 2d 1217, 79 S. Ct. 1173; Pyle v. Kansas, 317 U.S. 213, 87 L. Ed. 214, 63 S. Ct. 177; cf. Alcorta v. Texas, 355 U.S. 28, 2 L.Ed. 2d 9, 78 S. Ct. 103. There can be no retreat from that principle."

The principle of law is well established that a conviction obtained by the prosecution through the knowing use of false and perjured testimony cannot be permitted to stand even though the false evidence is not solicited by the prosecution, where no effort was made to correct it after discovery. United States v. Wilkins, 326 F. 2d 135 (2d Cir. 1964); United States v. Morrell, 524 F. 2d 550, 554 (2d Cir. 1975).

Our Court of Appeals, in People v. Savvides, 1 N.Y. 2d 554, 557 (1957):

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter that its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth... That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing as it did, a trial that in any real sense could be termed fair."

The judgment should be reversed and the indictment dismissed.

POINT III

The entry by police on December 27, 1973 into the building at 679-48th Street and into defendant's apartment to make a warrantless arrest of Rosario Barbarino was illegal, violated defendant's Constitutional rights and rendered defendant's arrest and the subsequent search and seizure of defendant's person and apartment illegal.

At the suppression hearing held on November 4, 1974,

police officer George Murphy testified that the police entered the building at 679 - 48th Street to go to Apartment 3E to arrest Barbarino was made on December 27, 1973 at approximately 3:25 P.M. (91, 93: November 4, 1974). It is not disputed that the police had no arrest warrant for anyone. Murphy testified that at that time the police had no search warrant for any premises (145).

Police officer Murphy testified that the purpose of the police in entering the building and in entering defendant's apartment was to

"...arrest Rosario Barbarino and any other occupant" (267).

The Court of Appeals in People v. Gallmon, 19 N.Y. 2d 390, 393 (1967) held that

"...the intent and purpose of the policeman prior to entry... controls ... the validity of the entry."

"An officer without an arrest warrant certainly has no more license than an officer with a warrant in seeking entry to effect an arrest. The constitutional safeguard that assures citizens privacy and security of their home unless a judicial officer determines that it must be overridden, is applicable not only in case of entry to search for property, but also in cases of entry to arrest a suspect. Dorman v. United States, 140 U.S. App. D.C. 313, 435 F.2d 385, 390 (1970)." United States v. Phillips, 497 F. 2d 1131, 1135 (9th Cir. 1974); Whiteley v. Warden, ____ U.S.____, 91 S. Ct. 1031 (1971).

CPL Section 140.15(4) authorizes a police officer to enter any premises to effect an arrest only when "he reasonably believes such person to be present". In United States v. Phillips, 497 F. 2d 1131, 1135 (7th Cir. 1974), the federal Court of Appeals stated, citing, United States v. Brown, 467 F. 2d 419, 423 (1972) which cited United States v. Watson, 307 F. Supp. 173 (D.C. 1969):

"...An officer seeking entry in order to effect an arrest cannot accomplish his task if the person he is looking for is not inside. Consequently, absent consent, the officer

cannot enter by any means, breaking or otherwise, unless he has responsible cause to believe the defendant is within.' 307 F. Supp. at 175. ... An agent must have probable cause to believe that the person he is attempting to arrest, with or without a warrant, is in a particular building at the time in question before that agent can legitimately enter the building by ruse or any other means. To hold otherwise is to grant the agent a license to go from house to house employing ruse entries in violation of the right of privacy of the respective occupants. In this case, the agents did not have probable cause to believe that Phillips was in the office building at the time of the raid and therefore the entry and subsequent arrest were invalid and the conviction must be reversed." (Underscoring added).

Murphy testified that the police had no knowledge that Barbarino was in or at 679 - 48th Street, Brooklyn, or at Apartment 3E, when they entered the building (169, 184, 214, 229, 277). Police Officer Murphy testified that no police officers had the apartment 3E, or the building under observation either before or after police officer Florio had allegedly first entered and had allegedly last exited therefrom (168-170). None of the police officers had any knowledge as to who was in that apartment (169, 184, 214, 229, 277). The police on the other hand knew that Rosario Barbarino did not reside in that building (268). Murphy testified that the police had "checked" and that apartment 3E was

"listed in the records of Brooklyn Union Gas Company and Consolidated Edison as belonging to Vincent Vidal"(288-289).

Further, the police knew that Rosario Barbarino resided at 2122-73rd Street (Florio: 1115-16, 1511-12; Toal: 2177-78, 2186, 2281-82, 2431-32; Kennedy: 2463).

Murphy testified that when the police entered apartment 3E, that Barbarino was not there and that none of the police saw him in the apartment (96-97, 229).

The suppression court made the finding that

"police officer Murphy ... spoke to undercover police officer Angelo Florio who told him that he had just purchased cocaine in that apartment ... and that they, at that time, decided to go to the apartment and arrest the perpetrators of the crime..." (285). (Underscoring added).

There was no evidence that the police entered to arrest "the perpetrators". The testimony of police officer Murphy was that the police went in to

"arrest Rosario Barbarino and any other occupant of the apartment" (267). (Underscoring added).

The suppression court's own findings show that the police had no reasonable cause to believe that Barbarino would be found in the apartment, to wit (288):

"I find that the officer had probable cause to enter the apartment to arrest the defendant Vidal (sic) and the defendant Barbarino who he had ample reason to believe might still be in the apartment in view of the short time that had elapsed from the time that the undercover agent saw Mr. Barbarino in the apartment" (288). (Underscoring added).

The court's finding is clearly speculative and conjectural. It is not based on the evidence. It is contrary to the evidence. 'To rely on conjecture is not due process of law by any definition'. Haley v. Ohio, 332 U.S. 596, 615 (1948).

The suppression court's finding that

"the police had probable cause to arrest the defendant Vidal..." (288) (Underscoring added)

is irrelevant.

The Nagra tape recording made by police officer Florio allegedly before, during, and following the alleged "sale of cocaine" between Florio and Rosario Barbarino, allegedly in defendant's apartment showed that Florio told his fellow officers prior to their entry into the building that he did not see the defendant (1571; see also 277).

Murphy gave no testimony that the police entered to arrest the defendant. The finding that the "police had probable cause to arrest the defendant Vidal" is irrelevant to the issue whether the police were authorized to enter the building and to enter Apartment 3E to "arrest Barbarino and any other occupant" (267).

The Supreme Court in Whiteley v. Warden, _____U.S._____, 91 S. Ct. 1031 (1971) held that a warrantless arrest must comply with the same standards as that required to obtain a warrant of arrest. Murphy's testimony that the purpose of the police in entering the building and the apartment was to

"arrest Rosario Barbarino and any other occupant" (267), (underscoring added)

was tailored to meet apparent constitutional and statutory obstacles to that entry and was tailored to the facts that the police knew that Barbarino was not in the building (169, 184, 214, 229, 277) and to cover up the fact that that statement of purpose was a pretext to break into the defendant's apartment and to arrest the defendant, not Barbarino; People v. Gallmon, 19 N.Y. 2d 389, 394-395 (1967); and should not be credited. People v. Parmiter, _____A.D. 2d _____, 390 N.Y.S. 2d 651 (2d Dept. 1977).

In People v. Nieves, 36 N.Y. 2d 396, 398 (1975) a search warrant which included the authority to search

"(a named person) and any other persons occupying said premises..."

was challenged as invalid. The court of Appeals held that the said description in the warrant did not satisfy Fourth Amendment Standards and was "too general". People v. Nieves, 36 N.Y. 2d 396, 400 (1975). Since that description would not satisfy Fourth Amend-

ment standards when it was included in a search warrant, it also does not satisfy Fourth Amendment standards to authorize the arrest or search of "any other persons occupying said premises" without a search warrant. Whiteley v. Warden, ____U.S.____, 91 S. Ct. 1031 (1971).

POINT IV

The warrantless entry into the building at 679 - 48th Street was forcible, was without announcement of purpose or authority, was illegal and all fruits therefrom must be suppressed.

The trial transcript shows that the lobby door entrance to the apartments in the building was locked, that the police, who were all in civilian clothes (141), gained entrance to the building at 679 - 48th Street, Brooklyn, by force of arms, in that, with gun(s) drawn (154) and badges displayed, police officer Florio compelled someone who was in the hallway of that building to take out his key and use it to open up the locked lobby door entrance of the building so that the police would be enabled to, and did, proceed into the building and up to Apartment 3E (1571-1574). Such forcible entry was illegal. United States v. Phillips, 497 497 F. 2d 1131 (9th Cir. 1974); People v. Salazar, ____M.2d____ (N.Y. Co. 1976); People v. Gallmon, 19 N.Y. 2d 389, 392 (1967).

> "An officer without an arrest warrant certainly has no more license than an officer with a warrant in seeking entry to effect an arrest. The constitutional safeguard that assures citizens privacy and security of their home unless a judicial officer determines that it must be overridden, is applicable not only in case of entry to search for property, but also in cases of entry to arrest a suspect. Dorman v. United States, 140 U.S. App. D.C. 313, 435 F. 2d 385, 390 (1970)." United States v. Phillips, 497 F. 2d 1131, 1135 (9th Cir. 1974); Whiteley v. Warden, ____U.S. ____, 91 S. Ct. 1031 (1971).

The police entry into the building was made without announcement of purpose and authority and was illegal and the arrest of the defendant, the search of his person and apartment, and the seizures made by police violated defendant's constitutional rights and require the voiding of the arrest and the suppression of all evidence allegedly seized. CPL Section 120.80(4); United States v. Miller, 357 U.S. 301, 306-314 (1957); People v. Gallmon, 19 N.Y. 2d 389, 390 (1967); Sabbath v. United States, 391 U.S. 585 (1968); People v. Floyd, 26 N.Y. 2d 558 (1970); People v. Frank, 35 N.Y. 2d 874 (1974); United States v. Phillips, 497 F. 2d 1131, 1135 (9 Cir. 1974); Dorman v. United States, 435 F. 2d 385, 390 (D.C. Cir. 1970); People v. Griffin, 22 A.D. 2d 957 (2d Dept. 1964).

POINT V

The warrantless forcible entry by the police into defendant's apartment without announcement of purpose violated defendant's constitutional rights and the arrest of defendant, the search of the defendant's person and of his apartment and the alleged seizures therefrom are illegal and must be suppressed.

After the police forcibly entered the building, without notice of purpose or authority to the occupants of the building, as aforesaid, they came up to Apartment 3E (150). Police officer Murphy testified that police officer Florio persistently pounded on the door of Apartment 3E at 679 - 48th Street, Brooklyn (150) and yelled out only:

"Police, Police... (149) ... Open the door ... (150)"

The suppression court found that the police knocked "strongly" (285) and

"announced 'Police, police, open the door' ... and that shortly thereafter the defendant Vincent Vidal opened the door to the apartment and that he was then told that he was under arrest; that the police officers placed handcuffs on the defendant..." (285).

The suppression court did not find that any of the officers had announced their purpose (284-291), and it could not have made such a finding in this record.

The evidence is undisputed that the police gave no notice of purpose to the defendant at Apartment 3E (150), and made no effort to satisfy the statutory requirement of giving notice of their purpose (CPL Section 120.80 (4)). The arrest of the defendant was unlawful and the evidence obtained as a result thereof must be suppressed, and defendant's conviction must be reversed and the indictment dismissed. People v. Floyd, 26 N.Y. 2d 558 (1970); People v. Mills, 31 A.D. 2d 433, aff'd. 26 N.Y. 2d 862 (1970); Miller v. United States, 357 U.S. 301 (1957); People v. Gallmon, 19 N.Y. 2d 389, 390, 395 (1967); People v. Frank, 35 N.Y. 2d 874 (1974); People v. Griffin, 22 A.D. 2d 957 (2d Dept. 1964).

POINT VI

There were no exigent circumstances to justify the warrantless, forcible entry into the building and into the apartment.

The burden of justifying a warrantless forcible entry into a private home is upon the government. United States v. Rosselli, 506 F. 2d 627 (7th Cir. 1974).

The prosecution did not meet its burden to justify the warrantless forcible entry into the building and into defendant's apartment. No evidence was presented by the prosecution of any exigent circumstances. The prosecution made no claim of any exi-

gent circumstances. The prosecution presented no argument of exigent circumstances. The court made no finding of any exigent circumstances (284-291).

"The Circuit Court for the District of Columbia (in Dorman v. United States, 140 U.S. App. D.C. 313, 435 F. 2d 385, 390 (1970)) listed six elements that have to be considered in justifying a warrantless entry to make an arrest: (1) That a grave offense is involved, particularly one that is a crime of violence; (2) That the suspect is reasonably believed to be armed; (3) A clear showing of probable cause to believe that the suspect committed the crime involved; (4) Strong reason to believe that the suspect is in the premises being entered; (5) A likelihood that the suspect will escape if not swiftly apprehended; and (6) The circumstance that the entry, though not consented, is made peaceably." United States v. Phillips, 497 F. 2d 1131, 1135 (7th Cir. 1974).

Under the facts of this case, set forth above, none of the six (6) criteria set down by the federal court to show exigent circumstances existed in this case.

POINT VII

The warrantless arrest of the defendant was made on pretext and violated defendant's constitutional rights.

Under the facts of this case, as set forth above, the true police purpose in forcibly breaking into the building and in forcibly breaking into the defendant's apartment was to arrest the defendant and to conduct a warrantless search of his person and his apartment. As shown above, there were no exigent circumstances. The matter was one plainly requiring only "normal investigative procedures", since defendant was known to the police, who knew where he resided (288-289).

The testimony of police officer Murphy shows that after Police officer Florio had knocked forcefully on the apartment door

and announced "Police, Police, open the door" (148-150), that the defendant Vidal opened the door (96) and the police immediately seized the defendant (96), "very, very fast" (155), at the doorway entrance to the apartment (96-97, 154), handcuffed his hands behind his back (97, 154) and forcibly put to the ground there (154). He was then forcibly taken from the entrance doorway, down the hall, around a right turn, and into the kitchen (189, 190) where the police forced the defendant down upon the kitchen floor there (99). Other officers went immediately from the entrance doorway, down through the foyer, down the hallway, past the kitchen, across the living room and into the bedroom (190-191), and searched the apartment (155-160).

There was no testimony whatever that the police asked defendant "Where is Barbarino?", nor that the police called out for Barbarino. The entry by police was not to arrest Barbarino but to unlawfully search defendant, and his apartment, and to arrest him. See, People v. Jefferson, 43 A.D. 2d 112 (1st Dept. 1973).

POINT VIII

All evidence allegedly seized by the police following the illegal police entry into the building and into defendant's apartment and the illegal arrest and search of the defendant's person and apartment must be suppressed, the counts of the consolidated indictment based thereon must be dismissed, and the judgment of conviction must be reversed.

Counts 4-10 and Counts 13-15 under indictment number 7826/73, which was "consolidated" with indictment number 7824/73, were renumbered by the court (309) to become Counts 10-19 (308,

684-699) under the consolidated indictment. Those counts charged possession of contraband allegedly seized by the police both from the person of defendant and from his apartment following their illegal entry and illegal search at the apartment (684-699). Additional evidence, which the police admitted was seized without any warrant, included money alleged to have been found by police in the kitchen and in the bedroom (179-180, 188-191, 227-229, 679-681), the .38 calibre Smith & Wesson revolver (99, 202, 694, 698) and the small bottle containing white powder (100, 202, 694-696). The .38 calibre revolver was the subject of counts 18 and 19 of the "consolidated" indictment (679-681), and the "small bottle containing white powder" was the subject of count 10 (696).

All of those items must be suppressed, the counts based thereon must be dismissed, the judgment reversed upon the principles set forth in Points II, III, IV, V, and VI.

In addition to the foregoing, all of those items must be suppressed, all of the counts based thereon must be dismissed, and the judgment of conviction of the defendant must be reversed upon the principles of unlawful search and seizure.

> "It is the rule that 'a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of exigent circumstances' (Coolidge v. New Hampshire, 403 U.S. 443, 474-475...) It is readily apparent that there were no exigent circumstances in this case." People v. Stadtmore, 52 A.D. 2d 853, 382 N.Y.S. 2d 807, 809 (2d Dept. 1976). (underscoring added).

The testimony of police officer Murphy shows that after Police officer Florio had knocked forcefully on the apartment door and announced "Police, Police, open the door" (148-150), that the defendant Vidal opened the door (96) and the police immediately

seized the defendant (96) "very, very fast" (155), at the doorway entrance to the apartment (96-97, 154), handcuffed his hands behind his back (97, 154) and forcibly put to the ground there (154). He was then forcibly taken from the entrance doorway, down the hall, around a right turn, and into the kitchen (189, 190) where the police forced the defendant down upon the kitchen floor there (99). Other officers went immediately from the entrance doorway, down through the foyer, down the hallway, past the kitchen, across the living room and into the bedroom (190-191).

Police "seized" without a warrant (201-2) a "revolver" (194-195), "a small container with a spoon attached and a black top containing a white ... powder" (200-202), and U.S. currency (201-202, 179-180, 188-191).

Murphy testified that the police conducted a search of the apartment prior to obtaining the search warrant (155-160).

Murphy testified that immediately after entering the apartment he started looking around the kitchen (157) and he and other officers started looking around the apartment and observing things. (155, 158-161, 207-209, 227-229, 240, 245, 247, 250-258, 259, 261-266). Police opened closet near bathroom (245), top drawer of table in bedroom (240), looked into kitchen cabinet (250-253), among other things. Murphy admitted that he had "observed" items which were in his inventory of the search warrant return before the search warrant was obtained, to wit: item 1, part of item 2, and items 16, 19, 20, and 21 (208). The items he "observed" before the search warrant was obtained, also included "three tin foils containing alleged cocaine, two white tablets, a large bag containing another large bag which contains nineteen

small plastic bags containing alleged marijuana, one tin foil of alleged marijuana, one marijuana cigarette; also included in this is a small paper bag containing two tin foils of vegetable matter and one manila envelope containing marijuana seeds ... a plastic bag containing a small plastic bag containing alleged cocaine, and a tin foil containing alleged cocaine; cup containing two plastic bags and two tin foils containing a white powder alleged to be cocaine, and one small vial containing a white powder, a plastic bottle containing a white powder. That's what I found on the bottom shelf" (263-264); and in addition, other items allegedly in the kitchen cabinet (265-267), also (112-113).

Murphy testified that the police simply went around the apartment making "observations" (155-160). People v. Parmiter, ___A.D.2d___, 390 N.Y.S. 2d 651 (2d Dept. 1977). Even if the police had only conducted an "observation" search, it would nonetheless be a warrantless and illegal search. People v. Howard, 395 N.Y.S. 2d 385 (N.Y. Co. 1977); Congold v. United States, 367 F.2d 1; Hernandez v. United States, 353 F. 2d 624; United States v. Barker, 514 F. 2d 208 (D.C. Cir. 1975).

The record shows that the police had no information at all that there were any drugs, or other contraband at the apartment prior to entering illegally and prior to making an actual rummaging search which they did, that the police had no probable cause to conduct any search, and that the search and seizure was unlawful. People v. Williams, 37 N.Y. 2d 206 (1975); People v. Clements, 37 N.Y. 2d 675, 678-679, 683 (1975); Chimel v. California, 395 U.S. 752 (1969). Even if there had been probable cause to search, it would never, of itself, justify a warrantless search or seizure.

United States v. Lewis, 504 F. 2d 92, 100 (6th Cir. 1974); United States v. Beck, 511 F. 2d 997, 1001 (6th Cir. 1975).

The record also shows that there were no exigent circumstances. Supra, Point V; People v. Clements, 37 N.Y. 2d 675, 678-679 (1975); People v. Abruzzi, 52 A.D. 2d 499, 501-504 (2d Dept. 1976), aff'd. 42 N.Y. 2d 813 (1977).

The search conducted here was a warrantless, illegal, rummaging search far from the actual point of the illegal "arrest" of the defendant, which occurred at the entrance doorway of the apartment (96, 97, 154). People v. Williams, 37 N.Y. 2d 206 (1975); People v. Clements, 37 N.Y. 2d 675, 682-683 (1975); Chimel v. California, 395 U.S. 752 (1969); Coolidge v. New Hampshire, 403 U.S. 443; Vale v. Louisiana, 339 U.S. 30; United States v. Jeffers, 342 U.S. 48; Agnello v. United States, 269 U.S. 20.

POINT IX

The search warrant was issued upon allegations derived from the unlawful entry, unlawful arrest of defendant, and unlawful search and seizure and was invalid.

The affidavit of police officer Murphy does not allege any facts to show the existence of any controlled substances in the defendant's apartment, except to the extent disclosed after the unlawful entry and unlawful search and seizure.

The statements in the affidavit of Murphy in support of the application for a search warrant of alleged prior sales of cocaine on November 8, 1973 and November 20, 1973, do not satisfy the Constitutional and Statutory requirements to show that there was in fact any drugs or other contraband present at the apartment.

People v. Floyd, 26 N.Y. 2d 558, 562 (1970).

There was no probable cause to issue the search warrant except upon the basis of the prior unlawful entry, search, and seizure. See also, 72-85, 11/4/74; 277-284, 11/4/74, as aforesaid.

The search warrant was issued upon allegations derived from the unlawful entry of the police into the building and into the apartment, the illegal arrest of defendant, and the warrantless unlawful search of defendant's apartment by the police. The search warrant was illegal. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1919); United States v. One 1973 Lincoln Continental, etc., 391 F. Supp. 1197, 1199-1200 (D.C. Cal. 1975); United States v. Solis, 393 F. Supp. 325 (D.C. Cal. 1975); People v. O'Neil, 11 N.Y. 2d 148, 153 (1962); People v. Grossman, 20 N.Y. 2d 346 (1967); McDonald v. United States, 335 U.S. 451; People v. Williams, 37 N.Y. 2d 266 (1975).

Point X

The trial court denied defendant a fair trial and due process of law by aiding and counselling the prosecutor in the prosecution of the consolidated indictment.

The trial court denied the defendant his fundamental right to a fair trial before a fair, dispassionate, and impartial judge and to due process of law by his repeated conduct in aiding and counselling the prosecutor in the prosecution of the consolidated indictment.

The trial court at a side bar instructed the prosecution witness, the police undercover, as to the testimony that the prosecutor wanted him to give. (800-801). The testimony was illegal hearsay "explanation" by the police undercover for the fact that defendant Vidal was not present at the time and place of the alleged "sale" on December 27, 1973 between former co-defendant Rosario Barbarino to the police undercover of "18 ounces of cocaine" for $18,500.00. The police undercover testified that he did not observe defendant Vidal at the time and place of the alleged "sale". The "explanation" by the police undercover was elicited to this jury through testimony of the illegal hearsay "conversation" between Rosario Barbarino and the police undercover.

This illegal hearsay "conversation" between Rosario

Barbarino and the police undercover was an essential element in the proof against the defendant Vidal to connect him with the "sale" between Barbarino and the police undercover to "explain" his absence. The prosecutor's game plan, which he told the trial court at a side bar conference (791-792) was to have the police undercover testify that he had a "conversation" with Barbarino in which he told Barbarino he did not want to deal with defendant Vidal and therefore that Vidal must have been hiding at the place and time of the sale between Barbarino and the police undercover. This illegal hearsay "conversation" between Barbarino and the police undercover was the "corroboration" for the testimony of Barbarino, a former co-defendant, and an accompliace as a matter of law under CPL 60.22, that defendant Vidal was "hiding" in another room when Barbarino made the "sale" to the police undercover on December 27, 1973. The prosecutor however was having trouble getting the police undercover to testify in accordance with his game play (797-800).

At that point, the trial court called a side bar conference and directed the police undercover, in the presence of the jury, to be present (800):

> "The Court: The objection is sustained. Members of the jury, we're going to have another side bar conference. The witness, Officer Florio is directed to attend.

Side Bar:

The Court: Officer, the District Attorney indicated that there was a conversation between you and Barbarino relating to something that occurred with reference to the sale of November 20 and the fact that no further dealing, that you didn't want to deal further. He also indicated that ---

Mr. Farkas: With Vidal, your honor. Let's get the record straight.

Mr. Sutton: If your Honor please, this is an area where we can no longer coach witnesses.

The Court: I don't think so. I'm telling it to him so that there will be no possibility of error in front of the jury.

Mr. Sutton: That's just the possibility of coaching a witness and I must respectfully object.

The Court: All right, your objection is on the record. It's overruled. ...." (800-801).

Thereafter, the side bar ended and the officer resumed the stand. The trial court overruled the repeated objections to the introduction of the illegal hearsay testimony by the police undercover (801-810). It is notable that when the police undercover testified that he could not recall the date of the conversation (802), the trial court, in the face of that testimony, ordered the police undercover to give a date for that "conversation".

"Q. Officer, after November 20, did you have conversations with Rosario Barbarino?

A. Yes, sir.

Q. And how many conversations have you had?

A. Several, sir.

Q. And in one of those conversations, did you ever discuss Vincent Vidal?

Mr. Sutton: Objection.

The Court: Overruled.

The Witness: Yes, sir.

Q. And what did you say to Mr. Barbarino and what did he say to you?

Mr. Sutton: Objection, Your Honor.

The Court: Fix a --- sustained. Fix an approximate date and time.

Q. The time that you were having --- the conversation that you were referring to, what date was that, if you know?

Q. I don't recall, sir. There were many conversations in between that time.

The Court: Can you fix a time, period, during which the conversation took place?

Mr. Sutton: Been asked and answered, Your Honor.

The Court: What!

Mr. Sutton: It's been asked and answered. He has already testified he can't recall.

The Court: Overruled. Answer the question.

The Witness: In the early part of December, sir.

Q. Can you fix any other time?

A. In the first, I'd say the second week in December, sometime in that --- the first and second week. ....." (801-802).

The trial court, over objections by the defense, then allowed the police undercover to testify to the illegal hearsay "conversation" between Barbarino and himself about which the trial court had previously instructed the prosecution witness (800-801):

> "Q. What did you say to Mr. Barbarino and what did he say to you?
>
> Mr. Sutton: Objection.
>
> The Court: Overruled.
>
> The Witness: I told him that I expected much better quality on the two ounces that I had made and he said that he was surprised that the stuff wasn't as good as it was supposed to be and I told him that I didn't want to do business. I said I had nothing against Mr. Vidal or Mr. Russo, but I just didn't care to do business with them if they were going to give me one thing and tell me that it was of a higher quality and he said there was no problem, that he had known of many different people who could give me, you know, the same amount of stuff and maybe for a lesser price or more. He'd have people who had stuff that was very high and people high -- high in price and people who had stuff that was low in price, but it would be much lower in quality." (802-803).

The "conversation" was not merely illegal hearsay, but it allowed the prosecution to place before the jury the illegal, grossly unfair and prejudicial hearsay as a "fact" that the police undercover had "dealt" with the defendant Vidal which was a charge under counts 1, 2, 3, 4, 5 and 6 of the consolidated indictment, on November 8, and November 20, which the prosecution was required to prove by <u>legal</u> evidence beyond a reasonable doubt.

The trial court aided and counselled the prosecutor in the admission of People's Exhibit 6 (842-843), under Counts 7, 8 and 9, the alleged "cocaine sold" by Barbarino to the police undercover on December 27, 1973, as to which the police undercover testified that he did not observe the defendant Vidal to be present. The defense, on voir dire, elecited testimony from the undercover that he did not put the red identification markings on People's Exhibit 6 (842) and that he could not state that "this is the same plastic bag" upon which he had placed the identifying removable tape and that he couldn't identify the brown paper bag on PX 6 id as the brown paper bag he allegedly put a removable identifying tape (842). The trial court sustained defense objections to the admission of PX6 id (842). At that point, the trial court called counsel to the bench:

> "The Court: May I see counsel at the bench.
>
> Mr. Sutton: May we have a side bar on the record, Your Honor?
>
> The Court: Yes. Please excuse us.
>
> <u>Side Bar</u>:
>
> The Court: The reason I asked you to approach the bench is to tell you that you can ask him from today to tomorrow concerning the brown bag and the white plastic bag. I'm still not going to admit it into evidence. You have not connected it in any way to this defendant at this time. The others you have; they haven't been offered in evidence. This one you haven't and it's being offered in

evidence. I must sustain the objection. Up until now, there is absolutely no connection with anyone but Rosario Barbarino. Do you understand?

Mr. Sutton: May I respectfully object, Your Honor, to counselling of the prosecution.

Mr. Farkas: Your Honor, I object to that statement about 'counselling the prosecution'.

The Court: All right, let's proceed." (842-843).

The trial court also aided and counselled the prosecutor in front of the jury in getting People's Exhibit 1 for identification (Counts 1, 2 and 3 of the consolidated indictment) - alleged "cocaine" - (849-850) admitted into evidence after objection by the defense to its admission had been sustained by the trial court (849):

"Mr. Sutton: Your Honor, as of the moment, in the condition in which this is now, I respectfully object.

The Court: Sustained.

Mr. Farkas: I move to have it introduced subject to connection by testimony from the chemist, Your Honor.

The Court: May I remind you that all you did was show something to the witness who said he recognized it at this moment. If I understand correctly, that is.

Mr. Farkas: We (sic) did that yesterday.

The Court: No, we (sic) did not do it yesterday.

Mr. Farkas: I'll go over it." (849-850).

Thereafter, the prosecutor stated that he was offering the exhibit "subject to connection by testimony from the chemist..." (855). The trial court interrupted the prosecutor to instruct him that he didn't "need any connection; it's already been connected to the defendant. The only thing you have to do now is to establish what it is because if it's talcum powder, you don't have a case." (855):

"Mr. Farkas: Further, Your Honor, I, since we are having a side bar, in order to save time later on this morning, I am offering that piece into evidence under the following: I am offering it subject to connection by testimony from the chemist and ---

The Court: You don't need any connection; it's already been connected to the defendant. The only thing you have to do now is establish what it is because if it's talcum powder, you don't have a case." (855).

On a voire dire by the defense as to the prosecutor's offer of PX-1 id into evidence, the undercover police officer testified that he could not identify the white powder as that involved in the alleged November 8, 1973 transaction charged in the indictment (876). The prosecutor objected that the witness had "already stated that he cannot identify the powder itself" (876). The prosecutor then stated "And I will stipulate that you cannot identify that white powder" (876). The trial court counselled the prosecution:

"The Court: It's not necessary to volunteer any stipulations" (876). (Underscoring added).

The police undercover testified also that he could not identify the tinfoil of PX-1 id as the tinfoil he allegedly received on November 8, 1973 (877-878). The trial court sustained the defense objection to the admission of PX-1 id into evidence by the prosecution (878).

The prosecutor asked for a side bar (879). At the side bar the trial court aided and counselled the prosecutor as to what the police undercover is to testify to so that the critical exhibit, PX-1 id, as to Counts 1, 2 and 3 of the consolidated indictment, could be admitted into evidence for the prosecution:

> "The Court: I just think that, as a technical matter, at this time, there's insufficient proof to warrant its introduction (882)..... Wait a minute! He hasn't identified it. The only thing he's identified is that piece of tape. He hasn't goine further than that (882)... I think that you have failed to establish at this point, sufficient grounds to warrant its introduction in evidence (883).... If you're concerned about the exhibit because it is not now in evidence, I think I can make the statement that I am satisfied that it will ultimately be received in evidence...(883)... (Underscoring added).
>
> Mr. Farkas: Would you like me to continue on this line?
>
> The Court: If you think that it will be fruitful, yes. To my knowledge, the officer hasn't even stated, for example, that the amount of cocaine (sic!) visible is the approximate amount that he received and that's a white powder the same as what he received and that the tinfoil appears to be the same tinfoil that the white powder was wrapped in when he placed it in the envelope. (Underscoring added).

> Mr. Farkas: I'll start again.
>
> Mr. Sutton: May I speak, Your Honor?
>
> The Court: Yes.
>
> Mr. Sutton: I most respectfully object to Your Honor's instructions and counselling of the assistant district attorney in setting out the course of questions and the questions themselves to be asked, particularly since, in connection with the tin foil, this particular witness has already testified he could not recognize this particular tin foil as being the tin foil that he claims to have been involved in the transaction of November 8 and he's already testified as to the white powder and he's already testified specifically. He cannot say that that alleged white powder is the one that was involved in the November 8 transaction. Your Honor ---
>
> The Court: He can say ---
>
> Mr. Sutton: I haven't finished, Your Honor.
>
> The Court: I'm sorry.
>
> Mr. Sutton: Your Honor's instructions to the assistant district attorney and the opening of doors to the assistant district attorney to put additional questions which have already been precluded by prior testimony of this witness, I consider the most prejudicial, I consider as a grave error, Your Honor, and I would urge Your Honor not to permit this kind of thing to continue.
>
> The Court: To my knowledge, the witness was never asked whether these items are, in his opinion, what he received on November 8 during the course of the alleged transaction and I will permit questions along that line.
>
> Mr. Sutton: May I speak again, Your Honor?
>
> The Court: Yes, but try not to be repetitious.

Mr. Sutton: Well, I must repeat the point that I've made before---

The Court: Why must you repeat points that you've made before?

Mr. Sutton: So that the record is clear, Your Honor and that is that this witness has already testified---

Mr. Farkas: I object to the statement as having been stated on the record already, Your Honor.

Mr. Sutton: Counsel, I'm not a witness, Your Honor, and I think I have a right to speak to this point and you've given me the permission.

The Court: Speak!

Mr. Sutton: Thank you. This specific witness has already testified that he, looking at this tin foil, cannot say that it was the tin foil that was involved in the November 8 transaction.

The Court: I'm aware of that.

Mr. Sutton: And he has also said that looking at that white powder, he can't say that that white powder---

The Court: I'm aware of that also. He can say he believes it's the tin foil and the white powder which he received on that date.

Mr. Sutton: Well, my objection is very clear now, I think.

The Court: Yes.

The prosecutor, by improper, and illegal, leading questions over repeated objections by the defense, pursued the tactics and course which the trial court advised him to follow with the obvious assurance by the trial court that when he did so, the trial court would receive PX-1 id into evidence (887-889). The trial court then did in fact receive PX-1 id into evidence upon the testimony of the undercover police officer that "in his opinion" the white powder in PX-1 id is the white powder he received on November 8, 1973.

In the face of his prior testimony that he could not identify it or recognize it (876):

> "Q. ... And in your opinion, officer, is the substance that is described, that is shown on the outside of the envelope sealed by the outer plastic the same substance that you received on November 8, 1973 in the Buick Riviera driven by Vincent Vidal handed to you by Vincent Vidal?
>
> Mr. Sutton: Objection.
>
> The Court: Overruled.
>
> The Witness: Yes, sir." (889).

The trial court, on another occasion, on its own, directed counsel to have a side bar on the admission of evidence against the defendant (940).

At the side bar the trial court counselled the prosecutor on a critical item of evidence and how to prose-

cute the case against the defendant and how to develop and establish evidence against the defendant (940-943). Defense counsel sensed that the reason for the side bar call by the trial court was to counsel the prosecutor (940). At the very outset of the side bar, defense counsel asked for permission to speak (940), and then directly urged the trial court "not to instruct the counsel for the prosecution on what to do and how to do it" (941). The prosecutor had moved to admit into evidence, a ladies'robe, PX-5 id (938), to which the defense objected and to which the trial court had twice previously sustained objection (831-832, 939). The ladies'robe was alleged by the prosecution to have been worn by defendant Vidal. The police undercover had testified that he did not see defendant Vidal but that he merely saw a "figure" wearing a robe. The trial court, on the prosecutor's second attempt to introduce the ladies' robe, PX-5 id into evidence, after sustaining the defense objection asked the prosecutor:

> "The Court: Sustained. What has changed since it was marked for identification?" (939).

The prosecutor then pursued more questions of the police undercover, which were insufficient to justify admitting the ladies' robe into evidence (939-940). The police undercover did not testify that the ladies' robe was found in the defendant's apartment (939-940). The police undercover testified:

> "Q. And when you were in there, did you enter the bedroom of the apartment?
>
> A. Yes.
>
> Mr. Sutton: Objection.
>
> The Court: Overruled.
>
> Q. And did you observe anything in the bedroom of that apartment?
>
> A. Yes.
>
> Q. What did you observe?
>
> A. A bed, a dresser.
>
> Q. I see. Anything else?
>
> A. No, sir." (940).

The prosecutor renewed his offer, the defense objected and the trial court called a side bar (940-941):

> "Mr. Farkas: Your Honor, at this time I renew my offer.
>
> Mr. Sutton: Objection, Your Honor.
>
> The Court: I think we'd better have a side bar. Please excuse us.
>
> Side Bar:
>
> Mr. Sutton: May I urge the court not to instruct the counsel for the prosecution on what to do and how to do it.
>
> .....
>
> The Court: All right, now, maybe I am mistaken but I have heard nothing with reference to this robe since it was marked for identification and since it was referred to as

being seen attached to an arm handing things out of a bedroom ..... When was it established that it's Vidal's apartment? I don't recall that. ..... There's been no testimony with reference to this robe being found in the apartment that I recall, has there?

Mr. Farkas: I thought there had been.

The Court: You thought there had been? Well, I don't think so.

Mr. Farkas: All right, we'll continue along the lines, sir. (Side bar concluded)." (940-943). (Underscoring added).

The prosecutor followed the counselling of the trial court and the trial court admitted the robe into evidence.

The prosecutor sought to introduce against the defendant Vidal, a tape recording of an alleged telephone conversation between the police undercover and Barbarino, People's Exhibit 7 for identification (945). Defense counsel objected (946) and the trial court sustained the objection (946). Later the prosecutor again offered that tape recording in evidence (982). Defense counsel objected (982). The trial court counselled the prosecutor as follows:

"The Court: I do not recall hearing a question put to this witness concerning other than that he recognizes it as a tape used on December 26 to phone Rosario and that it contains his voice and the voice of Rosario Barbarino and a female. I have heard no questions asked with respect to its accuracy as of yet.

Mr. Farkas: I'm about to.

The Court: All right, proceed.

Mr. Sutton: May we have a side bar, please.

The Court: No." (982-983). (Underscoring added).

The trial court blocked the defense from the opportunity to set forth his objection to the counselling.

The trial court counselled the prosecutor on another occasion so as to elicit testimony from Rosario Barbarino (and at the same time instructed Barbarino) as to the necessity to have Barbarino testify that he saw "whoever it was that knocked on the door" (1815). The witness however testified that he did not see who knocked on the door.

"Q. Now this person that knocked on the door the first time, did you later learn his name?

A. Yes.

Mr. Sutton: Objection.

The Court: I don't remember whether the testimony established whether the witness ever saw whoever it was that knocked on the door.

Mr. Farkas: I will ask this question. Did you see the person that knocked at the door the first time?

A. No." (1815). (Underscoring added).

Point XI

The trial court expressed opinions on the facts, directed findings of fact by the jury, unfairly marshaled the evidence, and denied the defendant a trial by jury and a fair trial.

During the course of the trial and in his charge to the jury the trial court expressed his opinion of the facts, directly and indirectly and made declarations of facts concerning disputed issues of material facts giving lip service to the defendant's fundamental rights of presumption of innocence and reasonable doubt. People v. Walker, 198 N.Y. 329 (1910); People v. Van Bramer, 235 A.D. 287, 257 N.Y.S. 99, aff'd. 261 N.Y. 505 (1932); People v. Ohanian, 245 N.Y. 2 (1927); People v. Kohn, 251 N.Y. 375, 379 (1929); McKenna v. People, 81 N.Y. 360 (1880); People v. McRae, 54 A.D. 2d 664, 388 N.Y.S. 2d 664 (1st Dept. 1976); People v. Davis, 353 A.D. 2d 870, 385 N.Y.S. 2d 345 (2d Dept. 1976); People v. Budd, 38 N.Y. 2d 988, 384 N.Y.S. 2d 435, 436 (1976).

After both sides had declared that they had no further questions of police chemist Acevedo who testified as to People's Exhibit 1, which was alleged cocaine on Counts 1, 2 and 3, and after the defense, on cross-examination had impeached that witness' testimony, and after that witness had

testified on cross-examination that he had no recollection of conducting any tests on that white powder in People's Exhibit 1, to wit:

> "Q. Do you have an independent recollection with respect to People's Exhibit 1 as to conducting any tests whatever on that white powder?
>
> A. No, sir; no recollection of this particular case, sir" (2832),

and other impeaching testimony, the trial court, by its unfair leading question, rehabilitated the witness, and expressed his own opinion that the white powder was "cocaine", and undermined and destroyed all the cross-examination that had occurred as if it had not happened:

> "By the Court:
>
> Q. Let me understand your testimony sir, so that there will be no mistake about it. Are you saying that the tests that you performed in the sequence that you performed them with respect to Exhibit 1, this is an absolute and complete and full indication that there is cocaine present in that white powder?
>
> A. That is correct.
>
> Q. Is there any question about it?
>
> A. No question about it, Your Honor." (2897).

Defense counsel objected (2897). However, the trial court did not strike out the questions and answers, and did not give any curative instructions to the jury (2897). The trial court's opinion that the white powder in PX-1 was

cocaine was clearly conveyed to the jury and left no room for jury deliberation on that vital issue.

In his charge to the jury, the trial court directed the jury concerning the evidence that prosecution witness, former co-defendant, and alleged accomplice Rosario Barbarino had been previously convicted of crime that

> "This evidence was solely to assist you in considering the credibility of the person giving the testimony and to determine the weight to be given to that testimony. You must not consider this evidence of the witness' prior conviction for any other purpose, or to permit it to otherwise influence you with respect to your verdict or determination. ..... It is your duty to determine whether this witness like any other witness is to be believed wholly, or partially or not at all. His prior conviction will not decide this for you...." (217-218). (Underscoring added).

The trial court after explaining the definition of possession charged the jury that

> "Now the People must also prove that the thing that the defendant so possessed was a controlled substance" (236).

The trial court thereupon declared to the jury that the item in evidence which the prosecution had offered as being from defendant's possession, was in fact from defendant's possession, and that the item was in fact cocaine, as follows:

> "You heard the officer's testimony that the item of property recovered from the defendant's alleged possession was submitted by him to the police laboratory and that it was analyzed there for the presence of cocaine. You also heard Eferan Acevedo testify that he was an employee of the police laboratory, that he examined the contents of the police property clerk's envelope with respect to this count and that he found that it contained cocaine. ...." (236).

The trial court thus charged and directed the jury to find those "facts". The trial court did not refer to the testimony on cross-examination which impeached each alleged "fact". The trial court did not marshal the evidence; he simply recited the "facts" which supported the prosecution's case, without referring to the counter-evidence disclosed by the cross-examination and by the glaring conflicts in testimoney between the prosecution witnesses and within each witness' own testimony.

The trial court declared to the jury that the testimony of each of the police chemists - he named them: "Acevedo, with respect to the alleged transaction of November 8th, Jeanne L. Farrar, with respect to the alleged transaction of November 20th, Igor Agatow, with respect to the alleged transaction of December 27th; and Thomas Castallano, with respect to the possession counts relating to the items allegedly found in the defendant's apartment on that same day, ... and his analysis of the substance offered in evidence (thus vouching the police chemists in fact had conducted analysis on each

substance offered in evidence, which was a matter highly in dispute) is that is known as expert testimony" (236). (Matter in parenthesis and underscoring added), and that each such police chemist was found by the trial as a matter of law "was an expert in his field of chemistry and drug analysis" (238).

The trial court thereupon instructed the jury that

> "The opinion stated by these experts from the witness stand was based on the particular facts as the expert himself observed them and recorded them." (238).

These statements directed the jury to make those findings notwithstanding that the trial evidence was contrary thereto, viz: Acevedo, on cross-examination as to Counts 1, 2 and 3, testified:

> "Q. Do you have an independent recollection with respect to People's Exhibit 1 as to conducting any tests whatever on this white powder?
>
> A. No." (2832).

Agatow testified that he had made no notes (2648) and that he had no recollection of conducting any tests on PX-6, as to Counts 7, 8 and 9 (2712); Catalano testified on cross-examination as to PX-20, Counts 10-15, that he had no independent recollection of having conducted any tests on any of the items alleged under Counts 10-15 (2990). Ferrar

testified on cross-examination that he made no notes whatever of any alleged analysis of PX-2, as to Counts 4, 5 and 6 (3165, 3154-3155). He also testified that his was a "re-analysis", and that he did not know what was originally in the evidence envelope (3145).

The trial court, having so declared his opinion, instructed the jury by an example not in the case, that they could reject the "expert's opinion.... for example if you learn that a chemist was bribed to make a false report" (238). The trial court effectively directed the jurors to accept his declaration of the "testimony" and "expertise" of the police chemists even though he stated that "his testimony is entitled to such as you find the expert's qualifications in his field warrant (238-239) since the trial court had previously ruled as a matter of law that "In this case the Court found as a matter of law that each of the chemists was an expert in his field of chemistry and drug analysis" (238).

The trial court directed the jury to find as a fact that the defendant - on each of the possession counts - possessed the drug unlawfully by his declaration as follows: "In this case you will note that there was no evidence that this defendant was entitled to possess any of the controlled substances involved in this case as a physician, patient, or otherwise" (240).

The trial court, as to Counts 4, 5 and 6, and as to Counts 7, 8 and 9, directed the jury to find as a fact that the substance was cocaine and that it weighed in excess of one ounce, to wit:

> "Now, you may recall the chemist Ferrar testified with respect to the November 20th transaction that he weighed the item which he found to be cocaine and that it weighed one and three quarter ounces and two grains. And you may further recall that Igor Agatow in testifying with respect to the substance which he examined also weighed it and that he found that it weighed one pound and one and three quarter ounces, plus four grains. Therefore, before the defendant could be convicted of either the sale relating to the -- the alleged sale relating to November 20th or the alleged sale relating to December 27th, in addition to the elements previously described, the People must have established that the cocaine was part of a mixture which weighed at least one ounce or more and that some part of it was cocaine..... It is sufficient that the aggregate weight of the substance was at least one ounce or more and contained some quantity of cocaine" (245-246). (Underscoring added).

The trial court also directed the jury to find as a fact that the items composing the possession counts under Counts 10 through 18 were all found in defendant's apartment (247):

> "Now, that therefore brings us to the remaining counts in the indictment, counts ten through eighteen. Each of those counts relates to what occurred on December 27th in the apartment after the police came in and after defendant Vidal was originally -- was arrested." (247). (Underscoring added).

The trial court directed the jury to find as a fact that the item at issue in Count 15 was marijuana, and that it was found in defendant's apartment (251) and that the item at issue in Count 10 was cocaine and it too was found in defendant's apartment (251), and that the cocaine so found weighed one and five eighth ounces plus nineteen grains (251):

> "And as you may recall that Thomas Catalano testified with respect to the marijuana allegedly found in the apartment, that he weighed it, and that it totalled ten and one-eighth ounces and eighteen grains.
>
> And while we are on that score, Catalano, you may recall, testified that he weighed the alleged cocaine found in the apartment and that the total weight was one and five-eighths ounces plus nineteen grains" (251).

The defense counsel duly excepted to the foregoing charges (261, 264-274). The trial court refused to charge further (261-274).

Point XII

> The prosecutor on summation violated defendant's right to a fair trial by his improper comments concerning defendant's failure to testify and by his improper comments concerning the defendant's failure to produce a witness to refute prosecution testimony.

One of the most vigorously contested issues was

whether the white powder offered into evidence by the prosecution was cocaine. There were ten (10) counts in the consolidated indictments which charged sale or possession of "cocaine". There were four (4) different alleged police chemists who gave testimony on that issue: Acevido, as to Counts 1, 2 and 3; Ferrar, as to Counts 4, 5 and 6; Agatow, as to Counts 7, 8 and 9; and Catalano, as to Count 10.

The defense conducted a cross-examination which impeached each one of the chemists on that issue.

On summation the prosecutor improperly commented concerning the failure of the defendant to produce a chemist witness as follows:

"Mr. Farkas: .... You also learned a lot about chemistry and when you leave here you will probably be able to tell your neighbors how to analyze drugs. But that isn't what this case is about either. Because if for a minute Mr. Sutton or Mr. Vidal---

Mr. Sutton: Objection. One minute.

The Court: Overruled.

Mr. Sutton: Your Honor---

The Court: Overruled. I don't want any speeches. Sit down.

Mr. Farkas: If for a minute there was any doubt whether this stuff is cocaine---

Mr. Sutton: Objection.

The Court: Overruled.

Mr. Farkas: He could have produced his own chemist.

Mr. Sutton: Objection.

The Court: With respect to that a defendant doesn't have to call any witnesses. Of course he can. In this case some witnesses were called by the defense, but members of the jury, the defense is under no obligation to produce or call any witnesses, if that's what he chooses to do. And the People must nevertheless establish the guilt of the defendant beyond a reasonable doubt. Proceed."

Mr. Sutton: Your Honor, I respectfully request a further instruction to the jury.

The Court: Request is denied.

Mr. Sutton: May I speak further?

The Court: No." (190-191).

The trial court's instruction to the jury was made belatedly and only after repeated objections by the defense and was inadequate to cure the wrong committed by the prosecutor (190-191). The trial court increased the prejudice to the defendant by the words he used, namely, that the defendant 'could produce witnesses and did produce some witnesses', but that the defense need not produce any witnesses

"if that's what it chooses to do." The trial court effectively shifted to defendant the burden to disprove the prosecution evidence if the defendant could.

The prosecutor even after the objections and aforesaid ruling by the trial court repeated his improper comments on defendant's failure to testify:

> "Mr. Farkas: ... I can't tell you what happened with Vincent Vidal, but Rosario Barbarino I was able to produce to you (196).... There is nothing at all that came from any item of evidence other than mere accusations and distortions from the defendant that in any way disprove any of this (203) .... And there is unchallenged evidence as to what this stuff is (205)." (Underscoring added).

The right to appellate review as to the latter comments is preserved, notwithstanding that defense did not specifically object thereto since the right involved is a fundamental constitutional right. People v. Patterson, 39 N.Y. 2d 288, 295-296, 383 N.Y.S. 2d 573 (1976).

The prosecutor's comments were improper and require a reversal of the judgment. People v. Mirenda, 23 N.Y. 2d 439, 457, 297 N.Y.S. 2d 532, 537 (1969). It cannot be said to be harmless beyond a reasonable doubt. People v. Crimmins, 36 N.Y. 2d 230, 367 N.Y.S. 2d 213 (1976).

Point XIII

> The trial transcript is incomplete in that a portion of the trial was not recorded by the court reporter and the trial court denied defendant's demand to direct the court reporter to record by stenographic notes that portion of the trial heard by the jury of two tape recordings between Barbarino and the police undercover.

The alleged tape recording of a telephone conversation between Barbarino and the police undercover allegedly on December 26, 1973 was critical, highly prejudicial, and utterly illegal hearsay evidence against the defendant. The defendant was not present and was not a party thereto. It was an important basis upon which the absence of defendant Vidal from the alleged "sale" by Barbarino to the police undercover was "explained" and was highly prejudicial to the defendant. The absence of any stenographic minutes and of a transcript of the illegal hearsay testimony by the tape recording, which was heard by the jury, and upon which the jury relied to render its verdict, was not available to the Appellate Division for review.

There was also no stenographic notes made and no transcripts were prepared of another tape recording of the illegal hearsay alleged conversation between Barbarino and the police undercover allegedly on December 27, 1973, which

allegedly recorded the "sale" transaction between Barbarino and the police undercover, which was the subject matter of Counts 7, 8 and 9 (1051-1052). This tape recording was played to the jury and was highly prejudicial to the defendant, and utterly illegal hearsay.

In each instance, the defense counsel duly demanded that the tape recordings which were played to the jury, be stenographically recorded and made part of the written record of the trial (989-990, 1051-1052). The trial court refused these demands in each instance (989-990; 1051-1052).

The trial transcript is incomplete.

This Court in People v. Giles, 152 N.Y. 136, 139 (1897) held that "the right to review upon the facts necessarily contemplates the preservation of the evidence."

This Court in People v. Pride, 3 N.Y. 2d 545, 549, 170 N.Y.S. 2d 321, 323 (1958) held that:

> "Our State has always regarded the right to appellate review in criminal matters an integral part of our judicial system and treated it as such. .... It has been the consistent policy of our Courts to preserve and promote that right as an effective, if imperfect, safeguard against impropriety or error in the trial of causes. This policy has been particularly manifest on a number of occasions where the failure to provide sufficiently comprehensive reports of the proceedings at the initial stage of litigation threatened to render nugatory the right to appeal (cases cited). In the instances cited the lower courts had failed to make and preserve an adequate record of the proceedings at the trial level. Unequivocally and with emphasis on the importance and fundamental nature of the right to appellate review, the courts on each occasion held that the making of such a record and its availability to the defendant-appellant were absolute requisites and concomitants of the right to review...."

This Court in People v. Hall, 32 N.Y. 2d 546, 551, 347 N.Y.S. 2d 16, 20 (1973) stated that

> "There can be no doubt that a criminal appellant is entitled to a 'record of sufficient completeness' (CPL 460.70, subd. 3; Code Crim. Pro. Section 485; Mayer v. City of Chicago, 404 U.S. 189, 193-195, 92 S. Ct. 410, 30 L. Ed. 2d 372; People v. Pride, 3 N.Y. 2d 545, 549, 170 N.Y.S. 2d 321, 323, 147 N.E. 2d 719, 720."

The defendant has been denied his constitutional and statutory right to due process of law and to a fair and complete appellate review of the entire proceedings. People v. Adams, 22 A.D. 2d 892, 255 N.Y.S. 2d 339 (2d Dept. 1964).

The foregoing defect is in addition to the fact that the Appellate Division did not have before it on review the transcript of the trial which had been made. As heretofore noted, in the letter to this Court dated July 26, 1978, the record before the Appellate Division was incomplete in that some 1,500 pages of trial transcript were not forwarded by the appeals bureau to the Appellate Division. The defendant's right to have the Appellate Division review the appeal

on the merits, which could only be accomplished on the full transcript and record at trial, was denied. People v. Hall, 32 N.Y. 2d 546, 551 (1973); People v. Borum, 8 N.Y. 2d 177 (1960).

Point XIV

The trial court denied the defendant his Sixth Amendment right to a public trial by sealing the courtroom and excluding the public during the extensive testimony of police officer Florio without just cause and without any hearing.

The trial court, with no more than the bare application by the prosecutor and a brief conclusory recital by the prosecutor of the necessity for the relief, without any hearing, and over the objection of the defense, sealed the courtroom and excluded the public during the testimony of a principal witness, Police Officer Florio who had allegedly acted as a police undercover (732-733):

> "Mr. Farkas: ..... There is an application that I'm making at this time out of the presence of the jury and that is that since my first officer will be Police Officer Florio, I ask that the courtroom be sealed. The officer is an undercover police officer and there is several case law on the matter. He is active in investigations open at this time. He would work and does, in fact, work with confidential informants whose identity would be uncovered if

> his identity is known and, therefore, I ask that the courtroom be closed, sealed under the rule of People versus Hinton. I don't have the citation but I can get it.
>
> The Court: I'm familiar with the case. Do you wish to be heard?
>
> Mr. Sutton: Yes, I do. I respectfully object, Your Honor, and I state to Your Honor that the clearing of the courtroom and the absence of the people in the courtroom would end up as a signal to the jury that something is amiss and that the prejudice or the absence of the people in the courtroom would be reflected against the defendant. Additionally, I believe and I most respectfully urge to the Court that the defendant is entitled to a public trial in this particular instance and there is no valid reason why this police officer should not testify in open court if he's going to testify at all.
>
> The Court: The objection is overruled. The application is granted. You have an exception."

The sealing of the courtroom and the denial of a public trial to the defendant, denied defendant his constitutional rights to a public trial and to due process of law. People v. Hinton, 31 N.Y. 2d 71, 334 N.Y.S. 2d 885 (1972); People v. Morales, 53 A.D. 2d 517, 383 N.Y.S. 2d 620 (1st Dept. 1976); People v. Boyd, 59 A.D. 2d 558, 397 N.Y.S. 2d 150 (2d Dept. 1977).

Conclusion

The petition should
be granted.

Dated: February 25, 1979

Respectfully submitted,

Bernard G. Ehrlich
Charles Sutton
Attorney for Petitioner
299 Broadway
New York, New York 10007
212-964-8612

APPENDIX

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 21, 1978

HON. JAMES D. HOPKINS, Justice Presiding
HON. JOSEPH A. SUOZZI,
HON. SAMUEL RABIN,
HON. J. IRWIN SHAPIRO, } *Associate Justices*

The People of the State of New York,

Respondent,

v.

Vincent Vidal,

Appellant

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Vincent Vidal,

defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered January 22, 1975, convicting him inter alia of various narcotics offenses, upon a jury verdict, and imposing sentence;

and the said appeal having been submitted by Charles Sutton, Esq., of counsel for the appellant, and submitted by Laurie Stein Hershey, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion & decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby modified, on the law, by reversing the conviction of criminal possession of a controlled substance in the third degree (count two of the consolidated indictment), and the sentence imposed thereon, and the said count is dismissed; and, as so modified, the judgment is hereby unanimously affirmed.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division

B/ms

_____ AD2d _____ . S - February 6, 1978

2535 E/77

The People, etc., respondent,
v. Vincent Vidal, appellant.

Charles Sutton, New York, N.Y., for appellant.

Eugene Gold, District Attorney, Brooklyn, N.Y. (Laurie Stein Hershey of counsel), for respondent.

Appeal by defendant from a judgment of the Supreme Court, Kings County (KREINDLER, J.), rendered January 22, 1975, convicting him inter alia of various narcotics offenses, upon a jury verdict, and imposing sentence.

Judgment modified, on the law, by reversing the conviction of criminal possession of a controlled substance in the third degree (count two of the consolidated indictment), and the sentence imposed thereon, and the said count is dismissed. As so modified, judgment affirmed.

The second count of the consolidated indictment is a lesser included offense of the first count thereof. The evidence does not support a finding of possession, as alleged in the second count, independent of the sale, as alleged in the first count. The other contentions raised by defendant have been considered and found to be without merit.

HOPKINS, J.P., SUOZZI, RABIN and SHAPIRO, JJ., concur.

#2290 s

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 26, 1978.

HON. JAMES D. HOPKINS, Justice Presiding
HON. JOSEPH A. SUOZZI
HON. SAMUEL RABIN
HON. J. IRWIN SHAPIRO
Associate Justices

The People, etc.,

Respondent,

v.

Vincent Vidal,

Appellant.

In the above entitled cause, the appellant having moved (1) for reargument of the appeal from a judgment of the Supreme Court, Kings County, rendered January 22, 1975, which was modified by order of this court dated February 21, 1978, and (2) to restore the appeal to the calendar for oral argument;

Now, upon the papers filed in support of the motion and there being no papers filed in opposition thereto; upon the papers on which the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the said motion is hereby denied.

Enter: IRVING N. SELKIN

Clerk of Appellate Division

State of New York
Court of Appeals

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

VINCENT VIDAL

CERTIFICATE DENYING LEAVE

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
November 27, 1978

Jacob D. Fuchsberg
Associate Judge

*Description of Order: Order, App. Div., 2nd Dept dated February 21, 1978 modifying judgment of Supreme Kings County rendered January 22, 1975

The Constitutional provisions involved in this case are:

(a) *Fifth Amendment:* "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ." U.S.C.A. Const. Amend. 5.

(b) *Sixth Amendment:* "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the assistance of Counsel for his defense." U.S.C.A. Const. Amend. 6.

(c) *Fourth Amendment:* "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

New York Criminal Procedure Law :
11A McKinney's , Part 2

§ 450.10. Appeal by defendant to intermediate appellate court; in what cases authorized as of right

An appeal to an intermediate appellate court may be taken as of right by the defendant from the following judgment, sentence and order of a criminal court:

1. A judgment other than one including a sentence of death;

2. A sentence other than one of death, as prescribed in subdivision one of section 450.30;

3. An order, entered pursuant to section 440.40, setting aside a sentence other than one of death, upon motion of the People.

L.1970, c. 996, § 1; amended L.1971, c. 671, § 1; L.1971, c. 788, § 3, all eff. Sept. 1, 1971.

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§ 460.70 Appeal; how perfected

1. Except as provided in subdivision two, the mode of and time for perfecting an appeal which has been taken to an intermediate appellate court from a judgment, sentence or order of a criminal court are determined by rules of the appellate division of the department in which such appellate court is located. Among the matters to be determined by such court rules are the times when the appeal must be noticed for and brought to argument, the content and form of the records and briefs to be served and filed, and the time when such records and briefs must be served and filed.

When an appeal is taken by a defendant pursuant to section 450.10, two transcripts shall be prepared and settled, one of which shall be filed with the criminal court by the court reporter, except that where the defendant is granted permission to proceed as a poor person by the appellate court, the court reporter shall promptly make and file with the criminal court two transcripts of the stenographic minutes of such proceedings as the appellate court shall direct. The expense of transcripts prepared for poor persons under this section shall be a state charge payable out of funds appropriated to the office of court administration for that purpose. The appellate court may where such is necessary for perfection of the appeal, order that the criminal court furnish one of such transcripts to the defendant or his counsel.

Supplement Page 94

§ 470.05 Determination of appeals; general criteria

1. An appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties.

2. For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an "exception" but is sufficient if the party made his position with respect to the ruling or instruction known to the court. In addition, a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered.

L.1970, c. 996, § 1, eff. Sept. 1, 1971.

Pages 442,443

§ 470.15 Determination of appeals by intermediate appellate courts; scope of review

1. Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant.

2. Upon such an appeal, the intermediate appellate court must either affirm or reverse or modify the criminal court judgment, sentence or order. The ways in which it may modify a judgment include, but are not limited to, the following:

(a) Upon a determination that the trial evidence adduced in support of a verdict is not legally sufficient to establish the defendant's guilt of an offense of which he was convicted but is legally sufficient to establish his guilt of a lesser included offense, the court may modify the judgment by changing it to one of conviction for the lesser offense;

(b) Upon a determination that the trial evidence is not legally sufficient to establish the defendant's guilt of all the offenses of which he was convicted but is legally sufficient to establish his guilt of one or more of such offenses, the court may modify the judgment by reversing it with respect to the unsupported counts and otherwise affirming it;

(c) Upon a determination that a sentence imposed upon a valid conviction is illegal or unduly harsh or severe, the court may modify the judgment by reversing it with respect to the sentence and by otherwise affirming it.

3. A reversal or a modification of a judgment, sentence or order must be based upon a determination made:

(a) Upon the law; or

(b) Upon the facts; or

(c) As a matter of discretion in the interest of justice; or

(d) Upon any two or all three of the bases specified in paragraphs (a), (b) and (c).

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Section 470.15 (cntd)

4. The kinds of determinations of reversal or modification deemed to be upon the law include, but are not limited to, the following:

(a) That a ruling or instruction of the court, duly protested by the defendant, as prescribed in subdivision two of section 470.05, at a trial resulting in a judgment, deprived the defendant of a fair trial;

(b) That evidence adduced at a trial resulting in a judgment was not legally sufficient to establish the defendant's guilt of an offense of which he was convicted;

(c) That a sentence was unauthorized, illegally imposed or otherwise invalid as a matter of law.

5. The kinds of determinations of reversal or modification deemed to be on the facts include, but are not limited to, a determination that a verdict of conviction resulting in a judgment was, in whole or in part, against the weight of the evidence.

6. The kinds of determinations of reversal or modification deemed to be made as a matter of discretion in the interest of justice include, but are not limited to, the following:

(a) That an error or defect occurring at a trial resulting in a judgment, which error or defect was not duly protested at trial as prescribed in subdivision two of section 470.05 so as to present a question of law, deprived the defendant of a fair trial;

(b) That a sentence, though legal, was unduly harsh or severe.

L.1970, c. 996, § 1, eff. Sept. 1, 1971.

§ 470.20 Determination of appeals by intermediate appellate courts; corrective action upon reversal or modification

Upon reversing or modifying a judgment, sentence or order of a criminal court, an intermediate appellate court must take or direct such corrective action as is necessary and appropriate both to rectify any injustice to the appellant resulting from the error or defect which is the subject of the reversal or modification and to protect the rights of the respondent. The particular corrective action to be taken or directed is governed in part by the following rules:

1. Upon a reversal of a judgment after trial for error or defect which resulted in prejudice to the defendant or deprived him of a fair trial, the court must, whether such reversal be on the law or as a matter of discretion in the interest of justice, order a new trial of the accusatory instrument and remit the case to the criminal court for such action.

2. Upon a reversal of a judgment after trial for legal insufficiency of trial evidence, the court must dismiss the accusatory instrument.

3. Upon a modification of a judgment after trial for legal insufficiency of trial evidence with respect to one or more but not all of the offenses of which the defendant was convicted, the court must dismiss the count or counts of the accusatory instrument determined to be legally unsupported and must otherwise affirm the judgment. In such case, it must either reduce the total sentence to that imposed by the criminal court upon the counts with respect to which the judgment is affirmed or remit the case to the criminal court for re-sentence upon such counts; provided that nothing contained in this paragraph precludes further sentence reduction in the exercise of the appellate court's discretion pursuant to subdivision six.

4. Upon a modification of a judgment after trial which reduces a conviction of a crime to one for a lesser included offense,

the court must remit the case to the criminal court with a direction that the latter sentence the defendant accordingly.

5. Upon a reversal or modification of a judgment after trial upon the ground that the verdict, either in its entirety or with respect to a particular count or counts, is against the weight of the trial evidence, the court must dismiss the accusatory instrument or any reversed count.

6. Upon modifying a judgment or reversing a sentence as a matter of discretion in the interest of justice upon the ground that the sentence is unduly harsh or severe, the court must itself impose some legally authorized lesser sentence.

L.1970, c. 996, § 1, eff. Sept. 1, 1971.

New York Criminal Procedure Law

§ 470.50 Reargument of appeal; motion and criteria for

1. After its determination of an appeal taken pursuant to article four hundred fifty,[1] an appellate court, in the interest of justice and for good cause shown, may in its discretion, upon motion of a party adversely affected by its determination, or upon its own motion, order a reargument or reconsideration of the

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§ 470.50 CRIMINAL PROCEDURE LAW Part 2

appeal. Upon such an order the court may either direct further oral argument by the parties or confine its reconsideration to re-examination of the issues as previously argued or submitted upon the appeal proper. Upon ordering a reargument or reconsideration of an appeal, the court must again determine the appeal pursuant to the provisions of this article.

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mc

No. [illegible]

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 23, 1975.

HON. FRANK A. GULOTTA, Presiding Justice
HON. SAMUEL RABIN)
HON. JAMES D. HOPKINS) Associate Justices
HON. M. HENRY MARTUSCELLO)
HON. HENRY J. LATHAM)

The People of the State of New York, Respondent, v. [illegible] Appellant.	Decision and Order - Motion to Dispense with Printing - Appeal from Judgment

In the above-entitled action, the above-named appellant (defendant) having appealed to this court from a judgment of the [illegible] Court, KINGS County, rendered JANUARY 22, 1975 and appellant having moved to dispense with printing;

Now, upon the papers filed in support of the motion and papers filed in opposition or relating thereto; and the motion having been duly submitted and due deliberation having been had thereon; it is

ORDERED that the motion is hereby granted.

The appeal will be heard on the original papers (including a typewritten certified transcript of the stenographic minutes) and on appellant's and respondent's briefs, which may be in legible typewritten form or in any other legible form authorized by this court's rules and which must comply with said rules (22A NYCRR 670.1 et seq.).

The parties are directed to file eight copies of their respective briefs and to serve one copy on each other.

Pursuant to statute (CPL 460.70), within the twenty-day period prescribed therein, the stenographer of the trial court is required to make, certify and file two typewritten transcripts of the stenographic minutes of the proceedings of the hearing trial and sentence and the clerk of the trial court shall furnish one of such certified transcripts to appellant, without charge.

Appellant's time to perfect the appeal is enlarged to the November term, which begins November 10, 1975 ; appeal ordered on the calendar for said term; appellant's brief must be served and filed on or before September 19, 1975 and respondent's brief must be served and filed on or before October 17, 1975.

Enter:

Defendant's address:
c/o [illegible]

IRVING N. SELKIN
Clerk of the Appellate Division
DATE: 6/23/75 No. 2559

To be Argued by:
Charles Sutton, Esq.
30 minutes

SUPREME COURT : APPELLATE DIVISION
SECOND DEPARTMENT

- - - - - - - - - - - - - - - - - - - -X

PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

v. :

VINCENT VIDAL, :

Defendant-Appellant. :

- - - - - - - - - - - - - - - - - - - -X

APPELLANT'S BRIEF

Charles Sutton
Attorney for Appellant
299 Broadway
New York, New York 10007
212-964-8612

Hon. Eugene R. Gold
District Attorney, Kings County
Municipal Building
Brooklyn, New York
212-643-5100
Indictment Nos.: 7824/73
7826/73

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INDEX (Continued)

QUESTIONS

1. Was the evidence insufficient to sustain the conviction of the defendant under each count of the indictment respectively?

2. Was the defendant denied his Constitutional rights to due process of law and equal protection of the laws by the knowing use of false evidence by the prosecution?

3. Was the defendant denied his Constitutional rights to a fair trial by the conduct of the trial court?

4. Was the defendant denied his Constitutional rights to a fair trial by the conduct of the prosecutor?

5. Was the defendant denied his Constitutional rights by the unlawful search and seizure of the defendant and of his apartment on December 27, 1973?

a. Was the warrantless entry of the police by force into the building where defendant resided illegal?

b. Was that warrantless entry by force into the defendant's (1) building and (2) apartment without announcement of purpose and authority illegal?

c. Was the warrantless entry into the defendant's apartment illegal?

d. Was the warrantless search and seizure of the defendant and of his apartment illegal?

e. Was the warrantless arrest of the defendant illegal?

f. Was the subsequent warrant issued upon probable cause?

g. Was the warrant invalid?

h. Was the alleged warrant search and seizure illegal?

6. Was the defendant denied his Constitutional rights to due process of law and equal protection of the laws being tried for "conspiracy" and "acting in concert" allegedly with Rosario

Barbarino in the absence of any such allegations and charges in the indictments?

7. Was the defendant denied his constitutional rights to due process and equal protection of the laws by the introduction of illegal, hearsay evidence of "conspiracy" and "acting in concert" as aforesaid?

8. Was the defendant denied his constitutional rights to due process of law and equal protection of the laws by the egregious allowance of illegal leading questions and hearsay to convict the defendant?

9. Was the defendant denied his constitutional rights under the Fourteenth Amendment by the consolidation and amendment of indictments 7824/73 and 7826/73?

In The

Supreme Court of the United States

October Term 1979

No. 78-6276

VINCENT VIDAL,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

Brief In Opposition to a Petition For A Writ of Certiorari To The Supreme Court of the State of New York, Appellate Division, Second Department.

Eugene Gold
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I N D E X

TABLES OF AUTHORITIES

Cases

(continued)

Statutes

Treatises

STATEMENT AND SYNOPSIS OF PREVIOUS PROCEEDINGS.

Petitioner is seeking a Writ of Certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated February 21, 1978 affirming with modification a judgment of conviction of the Supreme Court of the State of New York, Kings County, and an order of the Appellate Division, Second Department denying petitioner's motion to reargue his appeal.

Petitioner was convicted after jury trial of Criminal Sale of a Controlled Substance in the First Degree and related narcotics offenses and sentenced to a term of fifteen (15) years to life imprisonment (Honorable Justice Robert S. Kriendler presiding). Petitioner was denied leave to appeal the decision of the Appellate Division, Second Department to the Court of Appeals of the State of New York by Honorable Jacob D. Fuchsberg, Associate Judge of that Court on November 27, 1978.

JURISDICTION

The jurisdiction of this court is invoked under 28 United States Code section 1257(3). (petition p.3).

The petitioner raises fourteen points involving essentially the adequacy of the appellate review afforded him; a claim of subornation of perjury by the prosecutor, the legality of his arrest and the ensuing search and seizure, and the conduct of the presiding judge and prosecutor at trial.

STATEMENT OF FACTS

By Kings County Indictment Number 7824/1973 petitioner, Rosario Barbarino and one other were charged with Criminal Sale of a Controlled Substance in the First Degree and related counts. These charges involved the sale of cocaine, in one instance in excess of one ounce, to an undercover police officer on November 8, 1973 and on November 20, 1973. Petitioner and Barbarino were also charged with narcotics offenses under Indictment 7826/ 1973.

The subject of petitioner's appeal to the Appellate Division, Second Department was the aforementioned conviction obtained against him following one trial of consolidated indictments 7824/73 and 7826/73 wherein he was the sole defendant on trial.

Suppression Hearing

On December 27, 1973, at approximately 3:00 p.m., POLICE OFFICER GEORGE MURPHY was informed by undercover Officer Angelo Florio that Florio had just purchased a quantity of cocaine at 679 48th Street, apt. 3E. (H. 3,4).* Within five minutes of this conversation, Murphy and fellow officers entered the building and approached apt. 3E. (H. 6,7). They obwerved a man in the doorway and the door being closed behind him from a person within. (H.7) They

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* Numbers preceded by "H" refer to minutes of the suppression hearing dated November 4, 1977.

pounded on the door, identifying themselves as officers and demanding entry. (H. 63) The door was opened and the officers entered, some with guns drawn. (H. 9,65,67). Petitioner was immediately arrested, handcuffed and placed on his stomach in the kitchen. (H. 10-12). A revolver and a small bottle containing a white powder with a spoon attached were subsequently recovered from petitioner's person. (H. 10,114).

The officers checked the rest of the apartment to see if anyone else was present. (H. 241). Officer Murphy then noticed through a clear glass door of a kitchen cabinet a clear plastic bag containing white powder, a quantity of tin foil packages, a small bottle containing white powder, and clear bags in another bag containing vegetable matter. (H. 25) U.S. currency was also seen in the kitchen and bedroom and was seized at that point. (H. 140, 141). Other officers observed other items in the apartment at that time. (H. 73)

Officer Murphy remained in the apartment for approximately two hours guarding petitioner and his cohort and awaiting the return of and further instructions from his seargent. (H. 15, 16). At approximately 5:30 p.m., the seargent returned and ordered Murphy to seek a search warrant. (H. 26).

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* Numbers preceded by "H" refer to minutes of the suppression hearing dated November 4, 1977.

Other than the U.S. Currency and the objects seized from petitioner's person, all items taken from the apartment were seized pursuant to a subsequently obtained search warrant signed by New York Criminal Court Justice Norman J. Feelog. (H. 27, 48). (Search Warrant and affidavit attached hereto as appendix).

Stating its findings of fact and conclusions, of law, the court denied the motions to suppress and to controvert the search warrant. (H. 284-291).

The Trial

On November 8, 1973, UNDERCOVER POLICE OFFICER ANGELO FLORIO met with Rosario Barbarino.* They entered a tan 1968 Buick Riviera in the vicinity of 60th Street and 3rd Avenue (9-14).** After the conversation, the driver of the car, produced a tin foil packet. (22, 23). [The powder contained therein was established through subsequent witnesses to contain cocaine.(2725, 2897)]. Barbarino sniffed the powder inside the packet.

Florio thereupon handed $100 to the passenger next to petitioner, who passed the money to petitioner, (23, 24). A conversation ensued about prospective buys of cocaine in which peti-

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* Rosario Barbarino, originally indicted with petitioner, testified for the People at trial in return for a prospective plea to a lesser charge. He ultimately pleaded guilty to an A III Felony and received life-time probation.

** Numbers in parenthesis refer to trial minutes dated November 12, 1974.

titioner quoted the price of $1000 per ounce (26). Florio and Barbarino departed each with a tin foil packet of white powder. (26).

On November 20, 1973, after conversing with Rosario Barbarino, undercover Officer Angelo Florio again met with him at 1965 69th Street, apt. 1A (34, 35). Petitioner entered this apartment and produced clear plastic bags containing white powder. (37) [Powder was established to be one and three-quarter ounces of cocaine through subsequent witnesses, (3143)]. In exchange for the bags, Florio gave petitioner $2000. (38).

In the first or second week of December, 1973, Officer Florio had a phone conversation with Barbarino wherein Florio expressed his desire not to do further business with petitioner because of the poor quality of the cocaine supplied. Barbarino stated that he had other sources. (57, 58, 61, 62). Further phone conversations were had between Florio and Barbarino on December 26th and December 27th during which the phone was tapped. (63, 76). They arranged for Florio to purchase 1/2 kilo (18 ounces) of cocaine for $18,500 on December 27th at 48th Street between 7 and 8th Avenues,..."The guy's house." (67, 69).

On December 27th, Florio equipped himself with a Nigra recording device and a Kel transmitter device and also equipped his vehicle with recording devices. (70, 82, 83, 85). He picked up Barbarino at a designated location and they proceeded to 679 48th Street, Apartment 3E. (88). On the corner of 48th Street and 7th

avenue, Florio noticed the same tan Buick with the same license plate that he had entered on November 8, 1973. (647).* He had ascertained that the plate was registered in petitioner's name. (646). He had also learned through further investigation that petitioner resided at the apartment he was about to enter (647, 2509).

Upon entering the apartment, Barbarino went into the bedroom and exited with a clear bag containing white powder. (92). Florio had observed a figure wearing what appeared to be lady's a robe step into the bedroom (89).

Florio examined the clear bag and returned it to Barbarino. (93). He then obserbed Barbarino walk back to the bedroom, and saw a sleeved arm reach from the bedroom and take the bag. (93). Florio exited the apartment to get the money he had left in the car. P.O. Kennedy, posing as the "person riding shotgun" to protect Florio' money, had guarded the car containing $18,200 while Florio was in the apartment. (652, 653, 656).

Upon re-entering the apartment with money, Florio again observed Barbarino approach the bedroom. From a distance of from 8 to 12 feet, he saw the same yellow sleeved arm protrude from the bedroom and hand Barbarino the clear bag. (96, 544, 564). Barbarino handed some of the $18,200 to the hand and said, "Here Vin." (p. 97). Florio gave $300 to Barbarino in exchange for

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* Numbers of trial transcript beginning with p. 501 refer to transcript of November 18, 1974.

the clear bag and exited the apartment leaving the rest of the $18,500 in the apartment (97).

Florio immediately met with his back-up team and within five mintues they returned to 679 48th Street. (935). They gained access to the building by commanding an occupant to unlock the front door. (572). At the time they had guns and shields displayed.(572). Upon approaching the 3rd floor landing, Florio obseved petitioner in the doorway of 3E, holding the door opened and conversing with another man. .(935). Florio stated, "Police", petitioner pushed the other man out and slammed the door closed (936). Florio kicked the door several times, announcing "Police, open the door." (937). The door was opened and the officers entered. (937). Florio observed the stack of bills on the kitchen table. (938). He remained a short time in apartment 3E. (1093).

Tapes of the phone conversations of December 26th and December 27th and the tape from the Nigra wired to Florio inside apartment 3E were played for the jury. Florio's testimony that he heard Barbarino state "here Vin" when Barbarino handed the money to the person in the bedroom was corroborated by the tape. (625).

ROSARIO BARBARINO testified that in return for his testimony he was promised a prospective sentence of eight (3) years to life imprisonment. (743).* In testifying about the November 8th, November 20th, and December 27th transactions, Barbarino corroborated Angelo

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* Numbers now refer to trial transcript dated Nov. 19, 1974, a.m. session.

Florio's testimony in many material respects. He further related his phone conversation with petitioner concerning the December 27th transaction wherein it was agreed that petitioner would remain in a separate room from Florio because of Florio's expressed dissatisfaction with petitioner as a supplier. (793).

Concerning the December 27th transaction itself Barbarino testified that petitioner remained in the bedroom and was wearing a multi-colored housecoat over dungarees. (798). The exchange of cocaine and money proceeded as Officer Florio had testified to (802-807). After the "buy" was consummated and Florio left the apartment, petitioner exited the bedroom and was no longer wearing the housecoat. (811). Barbarino could not remember whether he had been wearing the housecoat the second time Barbarino went to the bedroom. (925).

Petitioner and Barbarino were counting the money when they heard banging on the door and "open up, open up." (812). Petitioner was standing in the hallyway outside the kitchen with a gun pointed towards the door. (812, 8134, 819). Barbarino opened the door and was pushed and concealed behind it as the police entered. (814, 951, 952). At this point, he was not able to see petitioner or the position of his gun. (951). As the police proceeded into the apartment he fled with $2,150 through the front door, to the roof and out the fire escapt. (814, 817).

OFFICER PAUL DELUCIA, SARGEANT WILLIAM ALLEE and SARGEANT

JOSEPH TOAL testified to their activities as members of Officer Florio's back-up team. (1957-2448). Sargeant Toal stated that after leaving petitioner's apartment on Dec. 27th following the entry and arrest by the back-up team, he and officer Florio met with another officer on 65th Street and then went to Barbarino's home. (2177). They thereafter proceeded to the 62nd precinct to seal and sign the evidence (2178). Following that procedure, they went again to Barbarino's home and then returned to petitioner's apartment at approximately 10 p.m. (2186, 2187). At that point Officer Murphy had obtained a search warrant, but no search, other than for occupants, had been executed. (2187, 2188). Sargeant Toal directed Murphy to execute the warrant (2189).

ARGUMENT

REASONS FOR DENYING THE PETITION

POINT I

PETITIONER CANNOT SUBSTANTIATE A CLAIM OF DENIAL OF HIS RIGHT TO EFFECTIVE APPELLATE REVIEW.

Petitioner claims that he was denied his right to full and effective appellate review by the Appellate Division, Second Department on the grounds that a substantial portion of the trial transcript was never before that court. However, petitioner can point to no record on the basis of which he can substantiate this contention.

The lack of any record to support petitioner's claim indicates the impropriety of the assertion of that claim before this Court in a petition for a Writ of Certiorari. Ciucci v. State of Illinois, 356 U.S. 571 (1958), petition denied 357 U.S. 924 (1958); Villa v. Van Schaick, 299 U.S. 152 (1936). It further indicates that, at least at this juncture, the claim is without even colorable merit since no evidence has anywhere been adduced rebutting the presumption of regularity of judicial proceedings. Wigmore on Evidence, [9th Ed.], section 2534; State v. Burke, 253 Wis. 240, 33 NW2d 242 (1948); State v. Boles, 150 W.Va. 1, 146 S.E.2d 585 (1965); State v. Andrews, 282 Minn. 386, 165 N.W.2d 528 (1969).

Moreover, casting substantial doubt over the merits of petitioner's claim is the fact that the Appellate Division, Second Department denied his motion to reargue the appeal on the grounds

that an incomplete transcript had initially been submitted to the court. Honorable Judge Fuchsberg of the Court of Appeals also denied leave to appeal in spite of two lengthy letters to him by petitioner's counsel asserting the claim of an incomplete record on appeal before the Appellate Division, Second Department. It would thus appear that there indeed must have been a complete record on appeal before that court.

In short, petitioner's claim, the validity of which is seriously called into question by the above actions of the Appellate Division, Second Department and the Court of Appeals, is inappropriately before this Court as there is no record upon which this Court can determine its merits.*

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* While respondent does not concede that there is any merit to petitioner's claim, we note that his appropriate remedy would appear to be a post-judgment motion pursuant to New York Criminal Procedure Law Article 440 by which petitioner can attempt to adduce testimony on the record to substantiate his claim.

POINT II

PETITIONER'S ALLEGATIONS THAT THE PROSECUTOR SUBORNED PERJURY AND MISREPRESENTED FACTS TO THE COURT AND DEFENSE COUNSEL ARE UNSUPPORTED AND NEGATED BY THE RECORD.

Petitioner contends that the prosecutor "elicited false and perjured testimony from Rosario Barbarino" and lied to the court and counsel about Barbarino's status as an informant and as a prospective People's witness. More specifically, petitioner alleges that the trial assistant knew at the time of direct examination of Barbarino that Barbarino was promised and would receive a sentence of life-time probation, but nevertheless falsely led the jury and defense counsel to believe that the witness was promised eight years to life imprisonment. To support this contention, petitioner relies entirely upon a deposition of Henry M. Gargano, attorney for Rosario Barbarino, dated August 4, 1977 and the sentence recommendation of Assistant District Attorney Arnold Taub dated January 27, 1975.

Petitioner can place no reliance upon Gargano's deposition to support his argument because it is extraneous to the record on appeal. The sentence recommendation of Mr. Taub requesting that the court sentence Barbarino to life-time probation in no manner supports petitioner's argument. Nothing in this letter in any way indicates that Barbarino or his lawyer were ever promised a recommendation of life-time probation by the District Attorney's office, or if there ever were such a promise, at what point in time it was made.

Based upon these two documents counsel for petitioner now urges this Court to conclude that the trial assistant suborned perjury in the manner heretofore stated. It is clear that petitioner has no support for such allegation. Moreover, the trial testimony of Henry Gargano undermines petitioner's claim. In redirect examination of Gargano, who was called by the defense as a witness at trial, petitioner's counsel elicited the following in an improper attempt to impeach his own witness:

Mr. Sutton:

Q: Mr. Gargano, it is not a fact that at the present time you still are in the process of making arrangements for disposition as to cases against Mr. Barbarino with the District Attorney?

Mr. Gargano:

A. That's correct.

This passage would tend to indicate that no promise of lifetime probation had been made by the District Attorney's Office at the time Barbarino testified at trial.

Petitioner's second allegation that the trial assistant lied to the court and to defense counsel about Barbarino's status on the eve of trial is equally without any support in the record. There is no indication that the trial assistant ever misrepresented anything to the court or to defense counsel concerning Barbarino's status as an informant, or concerning his decision to turn state's evidence <u>following</u> the motion to consolidate and at

some point during the suppression hearing. The prosecutor never stated to the court that Barbarino, "first became an informant the day of the suppression hearing." (petition p. 23; nowhere in the record.)

In short, petitioner's allegations are simply concocted out of thin air. All the cases cited by petitioner involving intentional or negligent use of false and perjured testimony by a prosecutor are inapposite in that no false or perjured testimony can be shown to have been used in the case at bar, either intentionally or negligently.

POINT III

THE COURT CORRECTLY DENIED THE MOTION TO SUPPRESS EVIDENCE AND TO CONTROVERT THE SEARCH WARRANT. (Answering Petitioner's Points III through IX).

A. The Warrantless Arrest of Petitioner Was Based Upon Probable Cause and Was Executed in a Lawful Manner.

Petitioner contends at the outset that the warrantless arrest was unlawful since..."None of the police officers had any knowledge as to who was in the apartment." (p. 27 of the petition). According to petitioner the police lacked probable cause to arrest Barbarino since..."They knew Barbarino was not in the building", and it is irrelevant whether they had probable cause to arrest petitioner since it was not specifically stated at the suppression hearing by Officer Murphy that such was the purpose of their entry. (27-29 of petition.) (At the hearing, P.O. Murphy testified that the team entered apt. 3E..."to arrest Barbarino and any other occupant.")

We submit that the evidence unequivocally establishes the existence of probable cause to justify a warrantless entry into petitioner's apartment and his subsequent warrantless arrest. The legality of the arrest is governed by New York Criminal Procedure Law section 140.10 (1) (b), which provides that "a police officer may arrest a person for....[a] crime when he has reasonable cause to believe that such person has committed such crime..." Clearly

reasonable cause existed in the case at bar. Only 5 minutes prior to the entry, Florio had been in an apartment which he knew to be rented by one Vincent Vidal, petitioner. (2509, and warrant affidavit). Inside that apartment he had just purchased 1/2 kilo of cocaine from Barbarino and another faceless individual in the bedroom referred to as "Vin", or "Vinnie" (corroborated by tape, p. 625). On two occasions within a prior six week period Florio had purchased cocaine from Barbarino and petitioner whom the officers knew by name as early as November 9th. (H. p. 77). Hence, when viewed in the over-all context of the testimony, the one isolated statement of Murphy, cited by petitioner is meaningless. It was unequivocally demonstrated to the hearing court that the officers knew whose apartment they were about to enter and whom they were about to arrest.

An arresting officer need only have a reasonable belief that the suspect is present within the target premises. CPL sections 140. 15 (4), 120,80; People v. Fitzpatrick, 32 N.Y.2d 499, 509 (1973); People v. Ernest E., 38 A.D.2d 394 (2d Dept. 1971); app. dism 30 N.Y.2d 884 (1972); United States ex rel cantanzaro v. Mancusi, 404 F.2d 296 (2d Cir. 1968), cert. denied 397 U.S. 942 (1970); United States v. Hoflman, 488 F. 2d 287 (5th Cir. 1974). There can be no serious doubt that Florio and his team had reasonable cause to believe that peitioner was the "Vinnie" in the bedroom of his own apartment. CF. People v. Horowitz, 21 N.Y.2d 55

(1967); People v. Martin, 48 A.D.2d 213 (4th Dept. 1975); People v. Bolar, 49 A.D.2d 867 (1st Dept. 1975).

The arrest, furtheremore, was executed in a lawful manner. Criminal Procedure Law Section 140.15(4) provides that to effect a warrantless arrest "a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized...." in an arrest pursuant to a warrant. In making such an arrest section 120.80(4) provides that an officer need not give notice prior to entry if "there is reasonable cause to believe that the giving of such notice will: (a) Result in the defendant escaping or attempting to escape; or (b) Endanger the life or safety of the officer...; or (c) Result in the destruction, damaging or secretion or material evidence."

In arguing that the arrest was unlawful since the officers displayed their guns and shields in gaining entry to the building and the apartment,petitioner ignores these statutory provisions and the case law on "exigent circumstances" which they codify. See People v. Floyd, 26 N.Y.2d 558 (1970); Ker v. California, 374 U.S. 23, 38-39 (1963); People v. Delago, 16 N.Y.2d 289 (1965). Clearly, the arresting officers were justifiably concerned that if given the opportunity petitioner might attempt to escape and/or to secrete or destroy potential evidence on his person or in the apartment. This concern could have only been heightened when, upon

approaching the apartment itself, the officer observed petitioner hurriedly slam the door, leaving his cohort in the hallway. (H. 7). Moreover, the easily destructible nature of narcotics in and of itself justified the manner of the police entry into the building and into the apartment. People v. Delago, supra; People v. Galleges, (80 Misc. 2d 265). (Sup. Ct. Kings Co. 1975).

Having lawfully arrested petitioner, the officers were entitled to incidentally search his person and to seize the weapon and bottle of white powder discovered thereon. United States v. Robinson, 414 U.S. 218, 235 (1973); Chimel v. California, 395 U.S. 752, 762-63 (1969); People v. Malinsky, 15 N.Y.2d 86, 91 (1965); People v. Santiago, 13 N.Y.2d 326, 331 (1964). Moreover, we contend that all items seen by the officers in plain view while they were searching petitioner, and appearing to their experienced eye to be contraband, could have been seized at that point without the search warrant. (i.e. narcotics and narcotics paraphenalia observed through glass kitchen cabinet when petitioner was searched.) Coolidge v. New Hamshire, 403 U.S. 443, 465-467 (1971); Chimel v. California, 395 U.S. 752, 763 (1969); People v. Fitzpatrick, 32 N.Y.2d 499 (1973).*

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* See footnote, #24, p. 465 of Coolidge, supra, wherein this Court interpreting Chimel, supra, notes that evidence may be seized, although outside the immediate control of the arrestee, so long as plain view is obtained in the course of an appropriately limited search of the arrestee. See also Fitzparick, supra, wherein Court of Appeals approved the search of an entire room or area in which a defendant had been and to which he had full access.

B. The Search Warrant Was Issued Upon a Showing of Probable Cause And Was Valid In Every Respect.

It should be noted at this juncture that there is no indication in the record, contrary to petitioner's assertion, that an improper search of the apartment was conducted prior to the obtaining of a warrant. The officer testifying at the hearing stated consistently that an immediate sweep of the apartment was conducted to determine whether other persons were present therein. (H. 241). As the officer testified, as the record attests to, and as the Court adopted in its findings of fact, no search for contraband was conducted at that time. (H. 285, 286) [e.g. Petitioner's contention that the police opened the top drawers of a table in the bedroom prior to obtaining the warrant has no basis in the record. (p. 240 of the hearing which petitioner cites to support this claim in no manner does.)].

Hence petitioner's "fruit of the poisonous tree" argument, that the affidavit requesting the warrant was founded upon information obtained from an illegal search, must fail.

The affidavit clearly established probable cause for a full-scale search of petitioner's apartment. In the first place, the information in the affidavit was based upon the affiant's personal observations, and upon his fellow officer's first-hand transaction with petitioner, corroborated in part by the affiant's observations. Hence there was a reliable basis upon which the issuing magistrate

could credit the information. United States v. Ventresca, 380 U.S. 102, 111 (1965).

This information coupled with the November 8th and November 20th transactions furnished an ample basis for the magistrate to conclude that petitioner was involved in protracted and continuing large-scale narcotics operations, and that narcotics were presently inside his apartment. United States v. Harris, 482 F.2d 115, 1119 (3rd Cir. 1973); Cf. People v. Wright, 37 N.Y.2d 88, 91 (1975).

To conclude, the arrest of petitioner was lawful and the search warrant was properly issued upon a showing of probable cause.

POINT IV

PETITIONER WAS NOT DENIED A FAIR TRIAL BY THE CONDUCT OF THE TRIAL JUDGE OR THE PROSECUTOR.

The conduct of the trial judge we submit, was fair and proper throughout petitioner's trial. What petitioner characterizes as "counseling the prosecution", we submit was simply explanations to the prosecutor of the basis for conditional rulings denying offers of items into evidence. These explanations involved technical problems such as the point at which vouchered packages of narcotics and their contents were sufficiently identified (i.e., linked to petitioner) as to permit testimony concerning them and, their formal admission into evidence.(842, 843, 855, 876-878, 940, 941).

The narcotics evidence against petitioner was clearly admissible, having been scrupulously sealed, signed, vouchered and identified by the undercover officer and by various members of his back-up team immediately following the sales to the undercover officer. Moreover, the People presented four chemists who provided uncontroverted expert testimony as to the presence of cocaine in the substances offered into evidence. (2823-5, 2897, 2976-2984, 2992, 3191).* It can hardly be concluded that petitioner was

* The issue of the admissibility of the narcotics into evidence was extensively litigated in the appeal to the Appellate division, specifically regarding the questions of chain of custody and sufficient scientific testimony to support the expert conclusions that the substances were in fact narcotics.

denied a fair trial because of the trial judge's strict requirements, as communicated at times to the prosecutor, concerning the chronology of testimony he deemed necessary in order to establish identity and chain of custody of evidence prerequisite to its admission. Indeed, the judge sought only to protect petitioner's rights in this respect.

Nor was the court's questioning of witnesses violative of petitioner's rights. It is fundamental that a trial judge is entitled, indeed obligated to intervene in the questioning of witnesses when clarification of material issues appears to be necessary.* United States v. Pellegrino, 470 F.2d 1205 (2d Cir. 1972), cert. den. 411 U.S. 918 (1973). This the court did, and no more. [e.g. at 2897 where after exhaustive cross-examination by petitioner's counsel of the expert witnesses for the People, during which counsel virtually testified as an unsworn witness to his purported personal scientific expertise in chemical analysis, (2866, 2868, 2869, 2872, 2719, 2720, 2747, 2748, 2756, 2787, the

* It should be noted in this connection that throughout petitioner's trial, the judge found it necessary to repeatedly admonish his counsel about constantly "characterizing witnesses' answers", constantly interrupting and "baiting" the judge, and in general doing everything in his power to create chaos in the courtroom and cause commission of reversible error. (i.e. the trial is replete with instances of disruption of questioning of witnesses through repeated objections by defense counsel, just previously over-ruled, to the point where coherent testimony was rendered impossible.) Petitioner's counsel was ultimately ruled in contempt of court and sentenced to a fine of $100. (H. 248, H. 299, H. 305, H. 306, H. 307, H. 321, H. 322, 117, 118, 121, 752, 2007, 2017).

court asked the chemist Acevedo whether there was any question or doubt about his conclusion as to the presence of cocaine in the substance analyzed.].

Nor did the trial judge deny petitioner a fair trial in his charge to the jury which included all the standard instructions for the benefit of petitioner, including but not limited to the equal status of a police officer to that of any other witness (212), the right of petitioner not to testify (213), the requirement that accomplice testimony be corroborated (216-218), the People's burden of proof beyond a reasonable doubt (220-222), the non-evidentiary value of an indictment (222), the presumption of innocence (220), and the right of the jury to reject expert opinion testimony (238).

Petitioner's contention that the court"directed findings of fact" particularly with respect to the expert testimony is negated by the record. The court charged the jury:

> "Now, when a case involves a matter of science requiring special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his opinion for the aid of the court and the jury. The judge must decide whether or not a witness is an expert. But it is up to the jury to decide what credibility and what weight you will give to each chemist's testimony. In this case the Court found as a matter of law that each of the chemists was an expert in his field of chemistry and drug analysis. The opinion

> stated by these experts from the witness stand was based on the particular facts as the expert himself observed them and recorded them. You may reject an expert's opinion if you find the facts to be different from those which form the basis of his opinion, or you may reject his opinion if after careful consideration of all the evidence in the case, expert or otherwise, you disagree with his opinion.
>
> In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances established by other testimony. For example, if you learn that a chemist was bribed to make a false report. If you found that there is a substantial question as to whether the chemist analysed the right substance, you would be justified in rejecting his opinion. An expert's opinion is subject to the same rules regarding credibility as the testimony of any other witness. His testimony is entitled to such weight as you find the expert's qualifications in his field warrant. And while it must be considered by you it is not controlling on your judgment. (237-239). (emphasis added)

Nor did the prosecutor deny petitioner a fair trial. Petitioner complains of the prosecutor's remark in summation that if there was any doubt that the substances analysed contained cocaine, the defense could have produced their own chemist, and that the evidence in this respect was "unchallenged." (190, 205). [It is to be noted that the defense summation concentrated to a large extent on denigration of the expert testimony (174-185)]. However, any error in this comment was cured by the prompt instruction given by the judge that a defendant is under no obligation to produce any evidence or call any witnesses and that the people must prove guilt beyond a reasonable doubt. (190).

To conclude, petitioner was not denied a fair trial by either the trial judge or the procecutor.

POINT V

THE TRIAL TRANSCRIPT WAS NOT RENDERED INCOMPLETE BY FAILURE OF THE COURT STENOGRAPHER TO TRANSCRIBE THE TWO TAPES PLAYED FOR THE JURY. (Answering Petitioner's Point XIII).

At the outset, we dispute petitioner's contention that the telephone conversations between Barbarino and the undercover officer wherein narcotics dealings were discussed were "illegal hearsay" inadmissable against petitioner. These conversations were admissable against petitioner as declarations of a co-conspirator made during the course of and in furtherance of the conspiracy. People v. Rastelli, 37 N.Y.2d 240 (1975); People v. Liciano, 277 N.Y. 348, 358 (1928); People v. McKane, 143, N.Y. 455, 470 (1884); Richardson on Evidence, [10th Ed.], Prince, section 244, p.214.

Furthermore, petitioner's contention concerning the failure to stenographically transcribe the tapes is entirely specious. Insofar as the tapes were exhibits admitted into evidence, as such, they could have been made part of the record on appeal. Had petitioner truly wanted the Appellate Division, Second Department to hear the tapes, he had only to request that they be sent to that court along with the trial transcript. It is common practice for the Appellate Division to listen to tape recordings or to examine trial exhibits at the behest of appellate counsel.

Insofar as it was petitioner's responsibility to compile the record on appeal, it was his duty to include the tapes as

exhibits if he so desired. His failure to do this reveals his disinterest in having the Appellate Division review these recordings.

Petitioner's claim is obviously spurious.

POINT VI

THE COURT WAS JUSTIFIED IN SEALING THE COURTROOM DURING THE TESTIMONY OF THE UNDERCOVER OFFICER. (Answering Petitioner's Point XIV.

We submit that the court was justified in sealing the courtroom during the course of Officer Florio's testimony. While we recognize that a hearing should normally be held prior to a sealing order, we note that counsel below requested no such hearing, and that it has been held that while desirable, a hearing is not mandatory. People v. Jones, ____A.D.2d____, 405 NYS2d 461 (1st Dept. 1978), US ex rel Lloyd v. Vincent, 520 F.2d 1272, 1275 (1975).

In the instant case, the prosecutor represented to the court that the undercover officer was presently engaged in active investigations, and that sealing of the courtroom was necessary to protect the identity of confidential informants with whom he was working as well as his own identity. Such representations, we submit, justified the court's order, which was limited only to the testimony of the undercover officer. People v. Hinton, 31 N.Y.2d 71 (1972), cert. den. 410 U.S. 911 (1973); People v. Richenbacker, 50 A.D.2d 566 (2d Dept. 1975).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD IN ALL RESPECTS BE DENIED.

Dated: Brooklyn, New York
March, 1979

Respectfully submitted,

Eugene Gold
District Attorney
Kings County
210 Joralemon Street
Brooklyn, N.Y. 11201
(212) 834-5000

LAURIE S. HERSHEY
Assistant District Attorney
of Counsel

A P P E N D I X

Search Warrant
Sec. 787 C.C.P.

Criminal Court of the City of New York

Part ....., County of KINGS

In the name of the People of the State of New York:

To any peace officer in the City of New York.

Proof by affidavit (or deposition) having been made this day before me by

Police Office, George Murphy, shield #25787, 11th Narcotic Division, Brooklyn South Narcotic, New York Police Department

that there is probable cause for believing that certain property controlled substances and/or books and records pertaining to the sale or distribution of such controlled substances in violation of Article 220 of the Penal Law of New York.

You are therefore commanded, between 6:00 A.M. and 9:00 P.M. or any hour of the day or night.

to make an immediate search of 679 48th Street, Apartment 3-E., Borough of Brooklyn, County of Kings,; a multiple brick dwelling. Apartment 3-E is on the 3rd floor right hand rear.

occupied by Vincent Vidal, a known Narcotics violator.

and of the person of Controlled Substances as specified in Article 220: of the Penal Law of the State of New York.

and of any other person who may be found to have such property in his possession or under his control or to whom such property may have been delivered.

and if you find any such property or any part thereof to bring it before me at Part APAR 3 Criminal Court at ~~Supreme Court, Kings County~~ Adams Street 120 Schermerhorn Street, New York City.

Dated at New York City,
Dec. 27, 1973

Norman J. Felix
Judge

PG 1B

Search Warrant
Affidavit for
Sec. 787-a C.C.P.

Criminal Court of the City of New York

Part ....., County of KINGS

State of New York } ss.:
County of

P.O. GEORGE MURPHY, Shield #25787

being duly sworn, deposes and says:

1. I am Police Officer George Murphy shield #25789, the 11th Narcotics District, Brooklyn, South Narcotics.

2. I have information based upon my own knowledge and information given me by brother police officers and upon observations made by myself and brother officers. Among the information referred to are the following facts:

On November 8, 1973 at approximately 8:55 A.M. the defendant Vincent Vidal did sell approximately 1/8 ounce of Cocaine to an under cover police officer for $100.00 U.S. CURRENCY.

On November 20, 1973 at approximately 8:50 P.M. the defendant Vincent Vidal did sell approximately 2 ounces of Cocaine to an under cover police officer for $2000.00 U.S. currency.

On both of the above stated dates, November 8, 1973 and November 20, 1973 the defendant Vincent Vidal acted in concert with one Rosario Barberino, B#590117.

On December 27, 1973 at approximately 3:00 p.m. the undercover police officer did enter premises apartment 3-E 679 48th Street, Borough of Brooklyn, County of Kings. This apartment is listed in the records of the Brooklyn Union Gas Company as belonging to one Vincent Vidal. A further check of the Con Edison records show that they list this apartment as belonging to Vincent Vidal. In this apartment (3-E) at 3:00 p.m. on December 27, 1973, a person known to your deponent as Rosario Barberino Police Department identification number B#590117, did engage the undercover police officer in conversation concerning narcotics. Rosario Barberino at this time told the undercover police officer that the price of 1/2 kilo (approximately 18 ounces cocaine) would cost the undercover officer $18,500 in U.S. currency. [redacted] Rosario Barberino was then handed a clear plastic bag by a person outside the kitchen. The undercover police officer observed the contents of the bag and agreed to the purchase. At this time Rosario Barberino handed the bag to the person outside the kitchen, saying; "Here's the stuff Vinnie." The undercover police officer, accompanied by, Rosario then left apartment 3-E and went to the undercover police officer's vehicle.

3. Based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that such property REFERRED IN THE AFFIDAVIT

[redacted]

at premises Apartment 3-E, 679 48th Street, Brooklyn

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, in the form annexed, authorizing the search of SAID PREMISES

and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

No previous application in this matter has been made in this or any other court or to any other judge, justice or magistrate.

George Murphy 25787 PO ND 11
Police Officer Shield Rank Command

Sworn to before me
12-27 1973

Norman J. Felix
Judge

PG 1B

They picked up the money that was to be used for the purchase of the Cocaine and returned to apartment 3-E, 679 48th Street. At this time, within the kitchen of apartment 3-E Rosario Barberino began counting the $18,500. Barberino then took a portion of this money to give to the person who was not in the kitchen. The undercover police officer took the above referred to package containing cocaine and left the apartment.

After having discussed this event with the undercover officer at approximately 3:20 p.m. on the same day (December 27, 1973), your deponent and brother officers approached this apartment 3-E, 679 48th Street, Brooklyn. Defendant Dennis Vitale, male white, approximately 19 years of age, approximately 210 lbs., approximately 6' 2", brown hair, full beard, was seen exiting apartment 3-E. Your deponent and brother officers then knocked on the door of the apartment 3-E and were granted entry by the above referred to Vincent Vidal who was at this time the sole occupant of this apartment. On the kitchen table inside this apartment was approximately $10,000 of the money which which the undercover police officer had used to make the purchase of the referred to 18 ounces of cocaine (the serial numbers of this money having been recorded previously). In the bedroom of the same apartment, in open view on the bed was an additional recorded sum of U.S. currency totaling approximately $6,000. From the person of Vincent Vidal, a loaded 38 calibre revolver, and approximately 1/8 of an ounce of cocaine, were seized. Your deponent also saw in the glass front kitchen cabinet in the kitchen a clear plastic bag containing a white powder(approximately 1/2 ounce) within a paper cup behind this glass front. Based upon my seven and a half years in the Police Department and approximately 1 year as a member of the Narcotics Division, I believe that the bag behind the glass front contains a controlled substance.

Defendants Vincent Vidal and Dennis Vitale have been placed under arrest and police officers have been placed within the apartment 3-E, 679 48th Street, Brooklyn. Your deponent therefore respectfully requests of this court that the court issue a search warrant directing a search for and seizure of the property (any and all controlled substances, dilutants, paraphernalia, records of the sale and distribution of said controlled substances, monetary proceeds of said sale and distribution of controlled substances and any further dangerous weapons)designated herein at the premises designated herein; and at any time of the day or night. Such search to begin immediately after this court sees fit to grant the requested warrant.

P.O. George Murphy
Shield #2573
D.C.C.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
478-6276

- -X

VINCENT VIDAL, :

Petitioner, :

- against - :

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent. :

- -X

REPLY BRIEF IN SUPPORT OF PETITION

Bernard G. Ehrlich
Charles Sutton
299 Broadway
New York, New York 10007
212-964-8612

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IN THE
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Petitioner, :

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent. :

- -X

On Petition For a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department and the New York Court of Appeals

Reply Brief in Support of Petition

Statement

This reply brief is submitted in support of the petition for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department, and the New York Court of Appeals.

Point I

The facts establishing that the Appellate Division had only about one-half of the trial transcript before it for the review of the appeal were presented to the Appellate Division itself by the petitioner and were not opposed or disputed by the respondent.

In its brief at page 10, the respondent argued that "petitioner can point to no record on the basis of

which he can substantiate this contention .... that a substantial portion of the trial transcript was never before that court." The respondent is incorrect. The petitioner, by the affirmation of Charles Sutton dated April 27, 1978 set forth the facts showing that the Appellate Division did not have before it for the review of the petitioner's appeal the full trial transcript, that the Appellate Division had before it only about one-half of the trial transcript, and that pages "1200 (1500) to 3213/1" were not before the Appellate Division (Infra, 3a), (Petition, p.12). The record before the Appellate Division (by the affirmation of Charles Sutton dated April 27, 1978) recited the facts (Infra, 1a-5a). (The petitioner's attorney Charles Sutton conferred with Assistant District Attorney Helman Brooks, Chief of the Appeals Bureau of the Kings County District Attorney's office and informed him of those facts including the investigation and confirmation of these facts by the Kings County Supreme Court Appeals Bureau Clerk). The District Attorney did not oppose the petitioner's motion to the Appellate Division and submitted no papers whatever in opposition. (Petition pp. 12, 3a). When the District Attorney had the opportunity to deny or to challenge the facts presented by the petitioner to the Appellate Division, the District Attorney did not deny the facts and did not challenge the facts that the Appellate Division did not have for review of the Vidal appeal almost one-half of the trial transcript (petition pp. 12, 3a). The Appellate Division itself, when it had the opportunity to refute or deny those facts presented, did not do so. (Petition page 3a). Rather, the Appellate Division implicitly confirmed the facts that it did not have before

if the full trial transcript for the review of the appeal by its order dated and entered June 26, 1978, which denied petitioner's motion wherein the Appellate Division showed that the denial was based "upon the papers on which the appeal was determined" (Petition 3a). That language is confirmatory of the facts set forth in the affirmation of Charles Sutton dated April 27, 1978 that the Appellate Division did not have before it on its review of the appeal the full trial transcript. The Appellate Division knew what was before it on the review (Petition, p. 3a). The Appeals Bureau Clerk knew the exact pages of the trial transcript that he had received from the Appellate Division after the decision on the appeal (Petition, p. 12) (Infra, pp. 1a-5a). No responsible attorney would allege that the trial transcript before the Appellate Division had missing from it pages "1200 (1500) - 3213/1" (Petition, page 12) (Infra 3a) which constitutes almost one-half of the trial transcript, unless those facts had been investigated and confirmed (Petition, page 12) (Infra, pp. 1a-5a.) It is notable that the respondent still does not deny the facts that the Appellate Division had only about one-half of the trial transcript on its review of this appeal (Resp. pp. 10-11). The respondent argues that because the Appellate Division denied petitioner's motion, and New York Court of Appeals Judge Fuchsberg denied petitioner leave to appeal to the New York Court of Appeals that "It would thus appear that there indeed must have been a complete record on appeal before that court" (Resp. pp. 10-11). The argument is unreasoned, baseless and a non-sequitur. The Appellate Division's order denying

the petitioner's motion contradicts the respondent's argument by its statement that its denial was made "upon the papers upon which the appeal was determined" (Petition, p. 3a).

There is no presumption of regularity applicable to this case. The facts were explicitly presented to the Appellate Division showing that it did not have before it almost one-half of the trial transcript. The Appellate Division, if those were not the facts, easily would have said so. It did not say so. Indeed, the language it used in its order was confirmatory of the facts explicitly and directly set forth in the affirmation of Charles Sutton dated April 27, 1978 that pages "1200 (1500) - 3213/1" were <u>not</u> presented to and were not before the Appellate Division on its review of this appeal (Infra 1a-5a).

The respondent alleged in a footnote on page 11 of its brief that "we note that his appropriate remedy would appear to be a post-judgment motion pursuant to New York Criminal Procedure Law Article 440 by which petitioner can attempt to adduce testimony on the record to substantiate his claim." The respondent is incorrect. New York Criminal Procedure Law Article 440 is totally inapplicable. No post-judgment relief issue is involved on these facts that the Appellate Division had only about one-half of the trial transcript before it on the appeal. (Infra, 6a-8a).

The fact of the absence of a full record for the review of the appeal was presented by the petitioner to the Appellate Division in the only way available under

New York law, namely, by motion to the Appellate Division itself. There is no other way under New York law, known to petitioner, to present this issue. The lower court has no review jurisdiction or supervisory jurisdiction over its superior court, the Appellate Division. The determination of the extent of the trial transcript which was before the Appellate Division for its review of the appeal is not reviewable or determinable by a lower court. No procedure for such an inquiry by a lower court exists under New York Law.

Point II

The petitioner was denied his statutory and constitutional right to have the trial events fully recorded and to have the full record reviewed on appeal.

In addition to the facts and issue set forth in Point I, the petitioner was denied his right (CPL 460.70(3)) (Petition Point XIII, pp. 67-70) to have the trial proceedings duly recorded, by the refusal after explicit demand by petitioner to have the court reporter transcribe the words of the tape recordings played to the jury by the prosecutor.

The respondent has alleged in its brief at pp.26-27 that there is a practice that the Appellate Division will listen to tape recordings. The respondent's argument is contrary to the facts. There is no practice whatever of the Appellate Division "to listen to tape recordings". The Appellate Division does not listen to tape recordings as part of its review on appeal

of a trial record. The tape recordings could not be reviewed by the Appellate Division as tape recordings. The tape recordings of the conversations between Barbarino and police officer Florio (there were no tape recordings of the voice of the petitioner) were introduced into evidence and played to the jury. The trial court refused the petitioner's demand to have that evidence which the jury was hearing transcribed by the court reporter (Petition, pp.67-70). The prosecutor had represented to the trial court and defense counsel, after demand by defense counsel, that he would furnish defense a transcript of each tape recording. (11/1/74:52-53;11/4/74:66-67). However, the prosecutor did not produce any transcript at any time (11/13/74;954,955;989,990).The trial court nonetheless, over objection, allowed the prosecutor to play the tape recordings to the jury,and, over objection, to do so without having the court reporter make a trial record of what the jury heard. (Petition,p.68). The petitioner was denied his constitutional rights to due process of law and to have a review on appeal.(Petition, Point XIII).

Point III

The defendant was denied his fundamental right to due process of law and to a fair trial by the knowing use by the prosecution of false and perjured testimony.

The respondent at pages 12-14 of its brief attempted to avoid the charges of prosecutorial misconduct by argumentative conclusory assertions. Notably, the respondent did not deny that a promise of lifetime

probation had in fact been made to Rosario Barbarino prior to his testimony in this trial. (Resp. pp. 12-14). The respondent did not deny that Barbarino became a police informer on or about December 28, 1973 (Resp. Br. pp. 12-14). The recommendation of Assistant District Attorney Arnold Taub to the Barbarino sentencing court is a matter of official record of the Supreme Court, which record was presented to the Appellate Division. Penal Law Section 65.00(1)(b) requires that before any defendant can be sentenced to a period of probation "the prosecutor either orally on the record, or in a writing filed with the indictment recommends that court sentence such person to a period of probation upon the ground that such person has or is providing material assistance in the investigation, apprehension or prosecution of any person for a felony defined in article two hundred twenty or the attempt or the conspiracy to commit any such felony, ...", together with other requirements. (Underscoring added). Assistant District Attorney Arnold Taub, Chief of the Narcotics Bureau of the Kings County District Attorney's office, made such written recommendation dated January 27, 1975 to the trial court, pursuant to Penal Law Section 65.00(1)(b). In that written recommendation, A.D.A. Arnold Taub declared that Barbarino had surrendered to the police on the morning following December 27, 1973 (the date on which Barbarino had made an alleged drug sale to undercover police officer Florio) and that "Immediately upon his surrender, the defendant agreed to cooperate with the police Department by giving information regarding trafficking in drugs. He has continued to do so to date, and will continue subsequent to

the plea. His information has already resulted in numerous arrests, and active investigations are still in progress, begun, as a result of his information. In addition to the above, the defendant (Barbarino) agreed to, and in fact testified in the trials of both Vidal and Russo on behalf of the People ... The defendant (Barbarino) ... has and is continuing to provide material assistance in the investigation and apprehension of people for a felony defined in Article Two Hundred Twenty of the Penal Law, or the attempt or the conspiracy to commit such felony, ...". (Matter in parenthesis added). (Petitioner's Brief to Appellate Division, pp. 19a-20a).

It is important to consider and note that "....a defendant cannot automatically avail himself of the provisions of section 65.00 (subd. 1, par.(b)) even by cooperating with the police and other prosecutorial authorities." People v. Eason, 40 N.Y. 2d 297, 302 (1976). See also, People v. Lofton, 81 Misc. 2d 572, 366 N.Y.S. 2d 769 (Sup. Ct. Cr. T. 1975); People v. O'Neil, 85 Misc. 2d 130, 379 N.Y.S. 2d 244 (Sup. Ct., Cr. T. 1975). Absent a promise, express or implied, made to a defendant of a future recommendation "given or relied upon by defendant (Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427) ... the District Attorney is free to exercise his discretion". People v. Lofton, 81 Misc. 2d 572, 366 N.Y.S. 2d 769, 777. In this case, Henry M. Gargano, Esq., the attorney for Rosario Barbarino, testified by sworn deposition at the direction of Kings County Supreme Court Justice Arthur Hirsch "to give the date and arrangements made with the District Attorney and what the promise of the District Attorney was to Mr. Gargano if he

gave them certain information" (Infra, 9a-20a) that "The District Attorney at that time or on a subsequent time, which was shortly thereafter ... I would assume about a week, had advised me after I requested that a commitment be given in writing, that they could not give any positive commitment in writing or orally. However, they did assure me that if the defendant rendered sufficient cooperation with them, they would do whatever they could on his behalf with the end in mind of the possibility of lifetime probation ... Although I never received a direct promise from the District Attorney's office, it was my understanding that the Assistant District Attorney who I spoke to had agreed to do everything in his power to get a lifetime probation for Rosario Barbarino in exchange for his information and cooperation with the Police Department. I was convinced in my own mind that that would be an agreement. However, I got nothing in writing from the District Attorney's office nor any guarantee other than my conversations with that District Attorney. I was further advised by the Assistant District Atterney that the District Attorney's office had made such arrangements before in a similar manner and had carried out their end concerning lifetime probation." (Infra 17a-18a). The original agreement made in December 1973 between the District Attorney and Barbarino (through his attorney, Henry M. Gargano, Esq.) did not include a requirement that Barbarino give testimony against petitioner Vidal or another defendant, Thomas Russo (Infra, 17a).

Prosecution witness Rosario Barbarino was named a defendant in three (3) separate indictments,

namely 7824/1973, 7825/73, and 7826/73 (Petitioner's Brief to Appellate Division, p. 14a). The question and answer recited at page 13 of the Respondent's brief does not "tend to indicate that no promise of lifetime probation had been made by the District Attorney's office at the time Barbarino testified at trial." (Resp. Br. p. 13). It does indicate that Mr. Gargano was under pressure from the prosecutor not to disclose the promise of recommendation of lifetime probation. (See, Infra, 18a-19a).

Contrary to the assertions of respondent in its brief at pp.13-14, Barbarino did not 'decide to turn state's evidence following the motion to consolidate and at some point during the suppression hearing' ; the District Attorney knew since December 28, 1973 that Barbarino had become an informant and would not be tried for his crimes (Supra, pp.7,8; Pet.,pp.23-24.) The trial transcript(794) shows that the prosecutor misrepresented to the court and counsel as charged (Infra, p. 32a).The prosecutor also misrepresented that petitioner was involved in the Barbarino December 1, 1973 drug sale to the undercover poice officer (Infra, p. 32a). Only Barbarino had been indicted for that crime, indictment number 7825/73 (11/1/74:50-51). The prosecutor had declared on the record at the time of his motion to consolidate indictments 7824 and 7826 that "Yes, there is another sale I had on Barbarino. I am not joining the case with the others because he is charged on that alone. Now, there are tapes that refer to that particular sale. That will not be joined against the other defendants. That's 7825. That's where he is charged alone."(11/1/74:50-51). Since Barbarino was a police informer since December 28, 1973, and since the indictments were returned much later, the prosecution knew that Barbarino acted alone contrary to his assertions(794, infra,p.32a). Those misrepresentations turned the scales against petitioner testifying at trial.

The trial court added a conspiracy charge against the petitioner at trial and tried petitioner for the crime of conspiracy even though the indictment did not charge any conspiracy and did not even allege that petitioner acted in concert with anyone.

New York State Constitution Article 1 Section 6 expressly declares and provides that "No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in case of militia when in actual service, and (sic) the land, air and naval forces in time of war or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury.... No person shall be deprived of life, liberty or property without due process of law."

The two indictments against petitioner did not

charge the petitioner with any conspiracy count and did not charge or allege that he had acted in concert with anyone. (Infra, pp.25a-31a). There was no basis in the indictment to authorize the trial court to charge petitioner with the crime of conspiracy and to allow into evidence hearsay testimony under the alleged conspiracy exception to the rule against hearsay.

The allowance by the trial court of testimony of the conversations between prosecution witness Rosario Barbarino and police officer Florio which were conducted outside of the presence of the petitioner to prove not merely that the two had spoken the words, but to prove the truth of the words spoken by each of them, and to prove a conspiracy between Barbarino and the petitioner, denied the petitioner his fundamental right to due process of law and to a fair trial. Additionally, the trial court, at the commencement of the trial, during trial, and in its charge to the jury instructed the jury on the crime of conspiracy and authorized and directed the jury to convict the petitioner of the crimes charged in the indictment upon the trial court's conspiracy charge.

The defendant was convicted upon illegal and hearsay evidence introduced by the prosecution through Florio and Barbarino and upon the trial court's preliminary charges, rulings, and final charges of "acting in concert" with Barbarino and being involved in a "conspiracy" with Barbarino, as to the "transactions" charged under the indictment, to which Barbarino "confessed", and which "confessions" and "admissions" of crime by Barbarino were offered by the prosecution and the trial

court as evidence of defendant's guilt of the crimes charged. (Infra, 21a-31a). (11/1/74; 50 59; 11/4/74; 10-29; 722, 723, 728, 751, 774, 791, 792-791, 789-809, 818, 827-835, 3197-3205, etc.). The indictment did not allege that the defendant "acted in concert" with anyone and did not allege any conspiracy charge. The defendant was denied his constitutional rights thereby. Cole v. Arkansas, 333 U.S. 196 (1948); Thompson v. Louisville, 362 U.S. 199 (1960); Price v. Georgia, 398 U.S. 323 (1970); Stirone v. U.S., 361 U.S. 212 (1960); Berger v. U.S., 295 U.S. 78 (1935); People v. Batcheler, 57 A.D. 2d 1059 , 395 N.Y.S. 2d 846 (4th Dept. 1977).

Conclusion

The petition should be granted.

Respectfully submitted,

Bernard G. Ehrlich
by Charles Sutton

Bernard G. Ehrlich
Charles Sutton
299 Broadway
New York, New York 10007

Dated: March 23, 1979

SUPREME COURT: APPELLATE DIVISION
SECOND DEPARTMENT

'78 APR 28 AM 9:13

People of the State of New York,

Respondent,

v.

Vincent Vidal,

Defendant-Appellant.

CHARLES SUTTON, an attorney duly admitted to practice law in the State of New York practice affirms under penalty of perjury:

RECEIVED
APR 28 11 10 AM '78
APPELLATE DIVISION
SECOND DEPARTMENT

1) I am the attorney for the plaintiff and I personally familiar with the facts set forth herein except as to

2) This affirmation is submitted in support of appellants motion for an order to restore this appeal to the appeal calendar of this Court for actual argument.

3) In addition to the reasons set forth in my moving affirmation submitted with the Notice of Motion, the defendant-appellant respectfully requests that the appeal be restored to the appeal calendar of this Court for argument because this Court did not have in its possession and therefor did not read and review over fifteen hundred pages (1500) of the trial transcript representing the trial period between November 19, 1974 and November 29, 1974.

4) The total number of pages of the trial transcript was approximately 3,000 pages.

5) This court therefore did not have before it and did

not read and review approximately one-half of the trial transcript on this appeal.

6) The facts whereby this condition was caused arose out of simple human error and oversight.

7) At the time that the transcripts were delivered to me by the Kings County Clerk's Office Appeals Bureau (following this Court's order granting defendant forma pauperis relief) they were delivered in small boxes. Individual inspection of the boxes was not made. After I brought the boxes of transcripts to my office, the defendant's family requested permission to copy the transcript so that the defendant could read it. I thought that would be all right and I told the defendant's sister, Millie Mignano and the defendant's girl friend, Sally Hickey, that they could do that.

Thereafter, while I was out of the office, Miss Sally Hickey came to my office, and by my permission, of which I had instructed the office receptionist, took out the typed trial transcripts from the office and photocopied them. She returned the typed trial transcripts to my office. Thereafter she spoke to me and told me that there had been two typed copies of some parts of the trial transcript and that she therefor took one of the sets of the two typed copies, as they appeared, in order to save money on the reproduction cost. I thought nothing of it at the time. It seemed all right to me and a sensible thing for her to do to save money on the reproduction costs.

8) After the decision on their appeal, in view of the testimony and of the appellant's points and arguments on appeal, as set forth in the appellant's brief, a question was raised in my mind that this Court may not have had the full trial transcript for review.

I therefore personally checked the pages of the trial transcript that the Appeals Bureau of the Kings County Clerk's Office had in its possession which they had received back from the Appellate Division after the Court had rendered the decision on the appeal. That review showed that the trial transcript which the Appeals Bureau had received back from the Appellate Division was incomplete, and that the trial transcript for pages 1250 (1500) to 3213/1 were missing.

9) The Clerk of the Appeals Bureau telephoned to the Clerk's Office at the Appellate Division in my presence and inquired if the Appellate Division had any copies of the typed transcript that they had not returned to the Appeals Bureau. The Clerk at the Appellate Division reported, as I was informed by the Appeals Bureau Clerk, that the Appellate Division Clerk had no other typed transcripts in this case at the Appellate Division. Following that, I telephoned Millie Mignano, the defendant's sister and Sally Hickey, the defendant's girl friend. At my request, the defendant's girl friend visited the defendant who is jailed at Greenhaven Correctional Institution and retrieved for me the typed transcripts in his possession.

which are the 1500 pages which this Court never saw or had in its possession of which she had delivered to the defendant.

10) I brought that transcript copy, along with my own typed transcript copy and showed them to Mr. John Addeo, a Clerk in the Appeals Bureau at the Kings County Supreme Court.

11) It is clear that this Court simply did not have at least 1500 pages of the trial testimony and was thereby unable to review the appeal under the circumstances.

12) One, if not the prime reason why the missing pages were overlooked was that the period of November 18, 1974 to November 29, 1974 was taken at trial and transcribed by a different court reporter and that fact was stated in a statement in the trial transcript at pages 1254-1500 as follows:

> "Note that Sandor Weisberger is substitued in the part for Allen B. Shalfi from the 18th of November to the 29th at which time Mr. Shalfi has been temporarily reinstated."

13) The fact that this portion was missing was overlooked apparently because the sequencing continued apparently unbroken from front to back of that clip bound volume. The missing part in the middle of the clip bound volume was not apparent. It was apparently listed as one complete volume, or box for the full number of pages even though, in the middle, some 1500 pages were not there.

It is respectfully requested that this appeal be restored to the appeal calendar of this Court and that the

defendant appellant be accorded his statutory and constitutional rights to have a review on appeal from the judgment herein upon a complete record.

Charles Sutton

Charles Sutton

Dated: April 27, 1978

TITLE M—PROCEEDINGS AFTER JUDGMENT

ARTICLE 440—POST-JUDGMENT MOTIONS

Sec
440.10 Motion to vacate judgment.
440.20 Motion to set aside sentence; by defendant.
440.30 Motion to vacate judgment and to set aside sentence; procedure.
440.40 Motion to set aside sentence; by people.

§ 440.10 Motion to vacate judgment

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

(a) The court did not have jurisdiction of the action or of the person of the defendant; or

(b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or

(c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or

(d) Material evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States; or

(e) During the proceedings resulting in the judgment, the defendant, by reason of mental disease or defect, was incapable of understanding or participating in such proceedings; or

(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or

(g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more

6a

favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; or

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

(a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or

(b) The judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal; or

(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him; or

(d) The ground or issue raised relates solely to the validity of the sentence and not to the validity of the conviction.

3. Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal. This paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right; or

7a

(b) The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue; or

(c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

Although the court may deny the motion under any of the circumstances specified in this subdivision, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment.

4. If the court grants the motion, it must, except as provided in subdivision five, vacate the judgment, and must dismiss the accusatory instrument, or order a new trial, or take such other action as is appropriate in the circumstances.

5. Upon granting the motion upon the ground, as prescribed in paragraph (g) of subdivision one, that newly discovered evidence creates a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant in that the conviction would have been for a lesser offense than the one contained in the verdict, the court may either:

(a) Vacate the judgment and order a new trial; or

(b) With the consent of the people, modify the judgment by reducing it to one of conviction for such lesser offense. In such case, the court must re-sentence the defendant accordingly.

6. Upon a new trial resulting from an order vacating a judgment pursuant to this section, the indictment is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) those dismissed by the order vacating the judgment, and (c) those previously dismissed by an appellate court

8a

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

----------x

VINCENT VIDAL,

Plaintiff,

-against-

ROSARIO BARBARINO and HENRY M. GARGANO,

Defendants.

----------x

DEPOSITION of HENRY M. GARGANO, Defendant, taken by the Plaintiff, pursuant to Notice, held at the Clerk's office, Supreme Court, Kings County, Brooklyn, New York, on August 4, 1977, commencing at 2:10 p.m., before James Hendrickson, a Shorthand (Stenotype) Reporter and Notary Public of the State of New York.

BRADDICK REPORTING CO.
Depositions Hearings EBT'S
150 NASSAU STREET
NEW YORK, N. Y. 10038
(212) RE 2-3415

9a

APPEARANCES:

For the Plaintiff:

CHARLES SUTTON, ESQ.,
299 Broadway
New York, New York 10007

For the Defendant Gargano:

HENRY M. GARGANO, ESQ., Pro Se,
123 7th Avenue
Brooklyn, New York.

* * *

H E N R Y M. G A R G A N O, having been first duly sworn by a Notary Public of the State of New York, was examined and testified as follows:

EXAMINATION BY MR. SUTTON:

Q Mr. Gargano, what is your full name, address and occupation?

A Henry M. Gargano, 123 7th Avenue, Brooklyn, New York. I'm an attorney.

Q Mr. Gargano, on December 28, 1973 did you represent Rosario Barbarino?

A That's correct.

Q To your knowledge, were you informed that Rosario Barbarino was accused of the sale of a drug on or

about December 27, 1973?

A That's correct.

Q On December 28, 1973, did you arrange for the surrender to the police of the said Rosario Barbarino?

A That's correct.

Q Do you recall what station house you surrendered the defendant Rosario Barbarino to?

A I believe it was the office of the Brooklyn South Narcotics which was then housed on 4th Avenue and 30th Street.

Q Following the surrender of Mr. Barbarino, did Mr. Barbarino agree to cooperate with the Police Department and furnish information for the benefit of the police?

A I'm going to object to that question.

(Mr. Sutton and Mr. Gargano went before Judge Hirsch for rulings.)

THE COURT: It is the direction of the Court that the witness is to give the date and arrangements made with the District Attorney and what the promise of the District Attorney was to Mr. Gargano if he gave them certain information.

(Whereupon, all parties returned

to the Hearing Room.)

A At the time of the surrender, the police lieutenant in charge of the narcotics section had suggested that possibly Mr. Barbarino could render or could give them certain information that would be helpful to them. They in turn would speak to the District Attorney's office concerning this type of situation.

Q And this conversation with the lieutenant in charge of the narcotics unit at Brooklyn South, was that on December 28, 1973?

A I believe so.

Q Thereafter did you discuss the arrangement suggested by the lieutenant for the benefit of Rosario Barbarino with the District Attorney's office?

A I did.

Q Would you tell us the date or approximate date or dates and the arrangements made with the District Attorney and if you can remember the name of the District Attorney that you spoke to and also tell us what promise was made to you for Rosario Barbarino in return for Rosario Barbarino becoming an informant for the Police Department?

A Approximately a week after the surrender of Rosario Barbarino, I was in touch with the Kings

County District Attorney's office. The exact name of the District Attorney I don't remember at the time. I was in touch with him by telephone and I spoke to an Assistant District Attorney at that office who was in a supervisory capacity. He was familiar with the case. I at that time tried to exact positive commitments from him concerning a possible disposition of the defendant Barbarino.

Q When you say "disposition," specifically what did you discuss?

A I attempted at that time to exact a commitment that Barbarino would be guaranteed a lifetime probation.

Q What was the response of the District Attorney?

A The response of the District Attorney at that time was that he wouldn't give such a commitment.

Q "Such a commitment," meaning an absolute gurantee?

A That's correct.

Q What kind of an agreement did he give? What was the promise of the District Attorney in return for Barbarino working for the District Attorney's office or the Police Department?

A The District Attorney at that time or on a subsequent time, which was shortly thereafter --

Q Within a week or so?

A I would assume about a week.

-- had advised me after I requested that a commitment be given in writing, that they could not give any positive commitment in writing or orally.

However, they did assure me that if the defendant Barbarino rendered sufficient cooperation with them, they would do whatever they could on his behalf with the end in mind of the possibility of a lifetime probation.

Q In order to clarify the language, I know you are trying to be as accurate as you can, did you obtain from the District Attorney's office what you understood to be a promise of lifetime probation in return for Rosario Barbarino working for the Police?

A Although I never received a direct promise from the District Attorney's office, it was my understanding that the Assistant District Attorney who I spoke to had agreed to do everything in his power to get a lifetime probation for Rosario Barbarino in exchange for his information and cooperation with the Police Department.

I was convinced in my own mind that that would be an agreement. However, I got nothing in writing from the District Attorney's office nor any guarantee other than my conversations with that Assistant District Attorney.

I was further advised by the Assistant District Attorney that the District Attorney's office had made such arrangements before in a similar manner and had carried out their end concerning lifetime probation.

Q Did there come a time in April, in the first week of April on about April 3rd, 1974, when Rosario Barbarino was indicted for the sale of cocaine on December 27, 1973 and he was arrested and arraigned in the Supreme Court, Kings County, and was that April, 1974?

A I believe it was.

Q On that date when the arraignment was heard, if your recollection serves you, was it not Justice Starkey before whom the arraignment took place, Supreme Court, Kings County, Criminal Term?

A I believe it was, yes.

Q At the time of the arraignment, did the Assistant District Attorney in that part demand bail

against the defendant Rosario Barbarino in that indictment which was before Justice Starkey which was number 7825 of '73 in the amount of $50,000?

A I believe he did, yes.

Q At that time did you inform at side bar and off the record, did you inform the District Attorney, the Assistant District Attorney and Judge Starkey of the arrangement that you had made with the District Attorney for Rosario Barbarino as you stated above?

A Yes, I believe I did.

Q At that time did Justice Starkey state that taking your word, that he would reduce bail to $25,000 but until the District Attorney directly confirmed the arrangement that he would not reduce it more?

A I believe that was the conversation I had with him, yes.

Q Later that day, in the afternoon of that same day, did some assistant district attorney come from the Narcotics Bureau of the District Attorney's office inform the judge at side bar and off the record of the arrangement which you just stated above about a lifetime probation status for Rosario Barbarino?

A I don't know whether he informed the judge as to lifetime probation, but I do know that he had

informed the judge that Rosario Barbarino or informed the judge of Rosario Barbarino's agreement with the District Attorney's office.

Q As a result of that conversation, was the bail reduced?

A Yes, it was.

Q To the sum of $500?

A I believe it was, yes.

Q Mr. Gargano, to your knowledge, did the arrangement with the District Attorney's office include at the time it was made in December of 1973 a requirement on the part of Rosario Barbarino to testify against either or both Vincent Vidal or Thomas Russo at the trial?

A No.

Q So the arrangement for lifetime probation as you testified to just involved his work with the Police and giving information to the Police and the District Attorney's office without at that time the requirement that he give testimony against either Vincent Vidal or Thomas Russo?

A That's correct.

Q When for the first time did you learn, Mr. Gargano, that the District Attorney's office wanted to have Rosario Barbarino as a witness against Vincent

Vidal at trial?

A Shortly before I believe or around the same time that the suppression hearings was scheduled to start or had started.

Q That would be around the first week in November, 1974. Does that refresh your recollection?

A I believe it was around that time.

Q What was your impression when demand was made by the Trial Assistant District Attorney prosecuting the case of the People against Vincent Vidal when that prosecuting attorney demanded that Rosario Barbarino testify against Vidal?

A It was my impression that Rosario Barbarino had to continue a course of cooperation with the District Attorney's office if we expected and by "we," I mean my client, Barbarino, to receive a direction or request by the District Attorney's office to the Chief Administrative Judge requesting that Barbarino receive lifetime probation.

Q Did Rosario Barbarino testify against Vincent Vidal at trial in the case of the People against Vincent Vidal?

A To the best of my knowledge, he did.

Q Thereafter did the District Attorney make

a written recommendation to the appropriate judge for lifetime probation and recommend lifetime probation for Rosario Barbarino?

A Yes, the District Attorney's office did.

Q Was the defendant Rosario Barbarino thereafter duly sentenced to a lifetime probation for all the charges against him?

A Yes, he was.

HENRY M. GARGANO

Subscribed and sworn to
before me this 18 day
of August 1977.

CERTIFICATE

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

I, JAMES HENDRICKSON, a Notary Public within and for the State of New York, do hereby certify:

That HENRY M. GARGANO, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

And I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 5th day of August, 1977.

James Hendrickson
JAMES HENDRICKSON

INDICTMENT

no. 7824/73

Supreme Court of the State of New York
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK
against
XJ. VINCENT VIDAL
XJ. ROSARIO BARBARINO
X. THOMAS RUSSO
Defendant

INDICTMENT NO. 7824/1973 n
112/32-A

COUNTS

CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE FIRST DEGREE

CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE

CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SECOND DEGREE

CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE - 2 counts

CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SEVENTH DEGREE

A TRUE BILL

EUGENE GOLD
District Attorney

Foreman

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE FIRST DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about November 20, 1973, in the County of Kings, knowingly and unlawfully sold to a person whose name is known to the Grand Jury one and more preparations, compounds, mixtures and substances of an aggregate weight of one and more ounces and more containing a narcotic drug, to wit: cocaine.

SECOND COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about November 20, 1973, in the County of Kings, knowingly and unlawfully possessed a narcotic drug to wit: cocaine, with intent to sell the same.

THIRD COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SECOND DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about November 20, 1973, in the County of Kings, knowingly and unlawfully possessed one and more preparations, compounds, mixtures and substances of an aggregate weight of one and more ounces containing a narcotic drug, to wit: cocaine.

FOURTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about November 8, 1973, in the County of Kings, knowingly and unlawfully sold to a person whose name is known to the Grand Jury, a narcotic drug, to wit: cocaine.

FIFTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about November 8, 1973, in the County of Kings, knowingly and unlawfully possessed a narcotic drug, to wit: cocaine, with intent to sell the same.

SIXTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SEVENTH DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about November 8, 1973, in the County of Kings, knowingly and unlawfully possessed a controlled substance, to wit: cocaine.

EUGENE GOLD
DISTRICT ATTORNEY

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INDICTMENT

7826/73

#7826/73

Supreme Court of the State of New York

COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK

against

[redacted] Defendant

INDICTMENT NO. [redacted] 7826/73

THIS PAGE IN ITS ORIGINAL FORM FILED WITH THE COURT IS AS ILLEGIBLE AS APPEARS HERE.

COUNTS

[redacted]

A-I felony
2+07. A-I felony
narc drug Intent to sell A III fel
1+02 narc A-II fel.
2+02 narc C fel

Foreman

EUGENE GOLD
District Attorney

7-G
8-G
9 G
10 G
11 G
12 G
13 G
14 G
15 G
16 G
17 G
18 G

25a

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and ROSARIO BARBARINO, of the crime of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE FIRST DEGREE, committed as follows:

The defendants, VINCENT VIDAL and ROSARIO BARBARINO, on or about December 27, 1973, in the County of Kings, knowingly and unlawfully sold to a person whose name is known to the Grand Jury one or more preparations, compounds, mixtures and substances, of an aggregate weight of one and more ounces containing a narcotic drug, to wit: cocaine.

SECOND COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and ROSARIO BARBARINO, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE, committed as follows:

The defendants, VINCENT VIDAL and ROSARIO BARBARINO, on or about December 27, 1973, in the County of Kings, knowingly and unlawfully possessed a narcotic drug, to wit: cocaine, with intent to sell the same.

THIRD COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and ROSARIO BARBARINO, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE FIRST DEGREE, committed as follows:

The defendants, VINCENT VIDAL and ROSARIO BARBARINO, on or about December 27, 1973, in the County of Kings, knowingly and unlawfully possessed a substance consisting of one and more preparations, compounds, mixtures and substances of an aggregate weight of two ounces and more containing a narcotic drug, to wit: cocaine.

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FOURTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and DENNIS VITALE, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SECOND DEGREE, committed as follows:

The defendants, VINCENT VIDAL and DENNIS VITALE, each aiding the other and being actually present, on or about December 27, 1973 in the County of Kings, knowingly and unlawfully possessed one and more preparations, compounds, mixtures, and substances of an aggregate weight of one ounce and more containing a narcotic drug, to wit: cocaine.

FIFTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and DENNIS VITALE, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SEVENTH DEGREE, committed as follows:

The defendants, VINCENT VIDAL and DENNIS VITALE, each aiding the other and being actually present, on or about December 27, 1973 in the County of Kings, knowingly and unlawfully possessed a controlled substance, to wit: opium.

SIXTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and DENNIS VITALE, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SEVENTH DEGREE, committed as follows:

The defendants, VINCENT VIDAL and DENNIS VITALE, each aiding the other and being actually present, on or about December 27, 1973 in the County of Kings, knowingly and unlawfully possessed a controlled substance, to wit: amphetamine.

SEVENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment accuse the defendants, VINCENT VIDAL and DENNIS VITALE, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SEVENTH DEGREE, committed as follows:

The defendants, VINCENT VIDAL and DENNIS VITALE, each aiding the other and being actually present, on or about December 27, 1973, in the County of Kings, knowingly and unlawfully possessed a controlled substance, to wit: methaqualone.

EIGHTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and DENNIS VITALE, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SEVENTH DEGREE, committed as follows:

The defendants, VINCENT VIDAL and DENNIS VITALE, each aiding the other and being actually present, on or about December 27, 1973 in the County of Kings, knowingly and unlawfully possessed a controlled substance, to wit: barbiturates.

NINTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and DENNIS VITALE, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE FIFTH DEGREE, committed as follows:

The defendants, VINCENT VIDAL and DENNIS VITALE, each aiding the other and being actually present, on or about December 27, 1973 in the County of Kings, knowingly and unlawfully possessed one or more preparations, compounds, mixtures and substances of an aggregate weight of one-eighth ounce and more containing a narcotic drug, to wit: marijuana.

TENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and DENNIS VITALE, of the crime of CRIMINALLY USING DRUG PARAPHERNALIA IN THE SECOND DEGREE, committed as follows:

The defendants, VINCENT VIDAL and DENNIS VITALE, each aiding the other and being actually present, on or about December 27, 1973 in the County of Kings, knowingly possessed materials suitable for the packaging of individual quantities of narcotic drugs or stimulants, to wit: a quantity of manila envelopes, scales, empty capsules, spoon, and a strainer, under circumstances evincing an intent to use and under circumstances evincing knowledge that some person intends to use the same for the purpose of unlawfully manufacturing, packaging and dispensing of any narcotic drug or stimulant.

EUGENE GOLD
DISTRICT ATTORNEY

ELEVENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant, DENNIS VITALE, of the crime of OBSTRUCTING GOVERNMENTAL ADMINISTRATION, committed as follows:

The defendant, on or about December 27, 1973, in the County of Kings, did intentionally obstruct, impair and pervert the administration of law and other governmental function and did prevent and attempt to prevent a public servant, to wit: JOSEPH TOAL, a Police Officer of the Police Department of the City of New York, from performing an official function by means of intimidation, physical force, and interference and by means of any independently unlawful act.

TWELFTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant DENNIS VITALE, of the crime of POSSESSION OF WEAPONS AND DANGEROUS INSTRUMENTS AND APPLIANCES, AS A FELONY, committed as follows:

The defendant, DENNIS VITALE, on or about December 27, 1973, in the County of Kings, unlawfully had in his possession a firearm, to wit: a revolver, loaded with ammunition, such possession not being in the defendant's home or place of business.

THIRTEENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant VINCENT VIDAL of the crime of POSSESSION OF WEAPONS AND DANGEROUS INSTRUMENTS AND APPLIANCES, AS A MISDEMEANOR, committed as follows:

The defendant, VINCENT VIDAL, on or about December 27, 1973, in the County of Kings, unlawfully had in his possession a firearm, to wit: a revolver.

FOURTEENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant VINCENT VIDAL, of the crime of POSSESSION OF WEAPONS AND DANGEROUS INSTRUMENTS AND APPLIANCES, AS A MISDEMEANOR, committed as follows:

The defendant, VINCENT VIDAL, on or about December 27, 1973, in the County of Kings, unlawfully had in his possession a firearm, to wit: a revolver. The subject matter of this count being different than that set forth in the thirteenth count of the within indictment.

FIFTEENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant, VINCENT VIDAL, of the crime of CRIMINAL POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE, committed as follows:

The defendant, VINCENT VIDAL, on or about December 27, 1973 in the County of Kings, with intent to benefit himself and a person other than an owner thereof, knowingly possessed stolen property, to wit: a revolver, owned by GEORGE NELSON.

EUGENE GOLD
DISTRICT ATTORNEY

testimony to conversations, as to conversations other than those that relate to the sale of December 7 in which the defendant is not charged. I will permit the District Attorney to do so.

MR. SUTTON: Your Honor--

THE COURT: And you have an objection and an exception.

MR. SUTTON: Yes, I do have an objection, Your Honor and I think I've stated it many times before.

THE COURT: Yes.

MR. SUTTON: Now, Your Honor, with respect to the December 7 item that Mr. Farkas was referring to, does Mr. Farkas state on the record that that December 7 sale which is charged against Mr. Barbarino has nothing whatever to do with Mr. Vidal?

MR. FARKAS: It does have EVERYTHING to do with Mr. Vidal, but he couldn't be indicted because Rosario Barbarino did not tell us what happened on December 7 until the day of the suppression hearing. Had he been an informant at the time, Vidal would have been indicted for that sale also.

MR. SUTTON: Are you contending that Mr. Vidal and Mr. Barbarino are involved in an alleged sale on December 7?

MR. FARKAS: I believe it's December 7 and it involves nine ounces for $8,100.00, $400.00 of which you

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